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No. 1105

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

ABRAHAM L. KOOLISH, DAVID F. KOOLISH and JOHN B. CARNELL,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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IN THE

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No.

ABRAHAM L. KOOLISH, DAVID F. KOOLISH and JOHN B. CARNELL,

Petitioners,

VS.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioners Abraham L. Koolish, David F. Koolish, and John B. Carnell pray that the Court issue its writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered in the above-entitled matter on January 25, 1965, which affirmed the judgment of the United States District Court for the District of Minnesota finding petitioners guilty of the crimes of mail fraud and conspiracy. (18 U.S.C. §§ 1341,

CITATIONS TO OPINIONS BELOW.

The opinion of the Court of Appeals (Appendix A, App. 1 to 41) is reported in 340 F.2d 513. The District Court rendered two opinions at prior stages of the present proceeding. The first, which denied petitioners' pretrial motion to transfer on the ground that the inhabitants of the District had been prejudiced against defendants by persistent, provocative, massive, adverse and prejudicial pretrial newspaper, radio and television publicity throughout Minnesota, is reported in 205 F. Supp. 637. (Appendix B, App. 42 to 46.) The second, which denied petitioners' motion for new trial, is reported in 221 F. Supp. 776. (Appendix C, App. 47 to 86.)

JURISDICTIONAL STATEMENT.

The judgment of the Court of Appeals (Appendix D, App. 87) was entered on January 25, 1965. (C.A.R. 42.)*

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* "C.A.R." refers to the pages of the Certified Transcript of Proceedings in the Court of Appeals for the Eighth Circuit.

"R." refers to the pages of the original files from the District Court which comprised part of the Record on Appeal in the Court of Appeals.

"S.R." refers to the pages of the Supplemental Record on Appeal in the Court of Appeals.

"T." refers to the pages of the Transcript of Proceedings in the District Court.

"G. Ex." refers to the government's exhibits.

"D. Ex." refers to petitioners' exhibits.

"App." refers to the pages of the Appendices printed at the end of this Petition.

Pursuant to its rules, none of the record was printed for use in the Court of Appeals.

A timely petition for rehearing was filed February 15, 1965, (C.A.R. 43-56) and denied February 25, 1965. (C.A.R. 57.) On March 25, 1965, this Court (per Mr. Justice Byron R. White) extended to April 26, 1965 the time within which to file a petition for certiorari. (Appendix E., App. 88.) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Rule 22(2) of the Rules of this Court.

QUESTIONS PRESENTED.

1. Did the Court of Appeals deprive defendants of their constitutionally protected privilege against self-incrimination and otherwise transgress the provisions of Rule 29(a) of the Federal Rules of Criminal Procedure when, in affirming the denial by the District Court of defendants' motion for acquittal made at the close of the government's case in chief, it considered and applied as justification for the denial of said motion, testimony of defendants introduced by them following denial of their motion for acquittal, as well as evidence introduced by the government in its rebuttal?

2. In ruling that petitioners' motion for acquittal at the close of the government's case in chief was properly denied, did the Court of Appeals construe and apply the provisions of Rule 29(a) of the Federal Rules of Criminal Procedure differently from the construction and application given Rule 29(a) by the Court of Appeals for the District of Columbia in *Cephus* v. *United States*, 324 F.2d 893 (D.C. Cir. 1963) and *Franklin* v. *United States*, 330 F.2d 205 (D.C. Cir. 1964), so as to present a conflict in construction and application of the Rule between the circuits on an important question of federal criminal procedure?

3. Were petitioners' rights under the Due Process of Law, Confrontation and Fair Trial By Impartial Jury Clauses of the Fifth and Sixth Amendments to the Constitution of the United States violated by virtue of persistence by the District Attorney throughout the trial in:

   a. Asking some 298 argumentative and insinuating questions to all of which objections were sustained, 90 of which were asked after he had been directed by the Court to desist therefrom;

b. Asking insinuating questions of defendants on cross-examination, all of which elicited expected denials, and as to which he offered no evidence, which questions were framed so as to imply and insinuate in detail (and as to one of which the District Attorney represented to the Court in the presence of the jury he had proof) that certain conspiratorial meetings had been held, that petitioner A. L. Koolish, co-defendant Marvin L. Kline, as well as Fred Fadell, the co-defendant who entered a midtrial plea of guilty, had attended those meetings, that in the course thereof they made corrupting agreements for payment by petitioners to Fadell of alleged secret "kickbacks" which were in turn to be, and were, "split" by him with Kline in return for which Fadell and Kline agreed to forsake their duties and obligations to the Kenny Foundation to the monetary advantage of petitioners and their companies;

c. Employing in connection with and as a backdrop for the foregoing, various devices and means in the presence of the jury, (including the seating of Fadell in the spectators benches in the courtroom during the cross-examination of petitioner A. L. Koolish) designed to suggest to the jury that the District Attorney possessed wax disc recordings of telephone conversations between Fadell and petitioner A. L. Koolish with respect to said conspiratorial meetings and agreements, as well as a typewritten transcript of one of said telephone conversations; and then failing to call Fadell as a witness or to qualify and tender the supposed typewritten transcript in evidence to substan-

tiate these insinuations despite his representations to the Court at the time Fadell was permitted to change his plea, and later, that he would call Fadell as a Government witness and his further express representation to the Court that he had proof of his insinuations;

d. Asking insinuating questions affirmatively suggesting that co-defendant Kline had failed to report and pay income taxes on the share of the alleged "kickbacks" he had received from Fadell;

e. Asking insinuating questions suggesting that one of petitioners' managing employees, whom the District Attorney subpoenaed and interrogated but failed to call as a witness, had informed petitioners by oral communication to petitioner David Koolish, that in each of the fall "cold shot" mass mailings after 1955, 1,500,000 Kenny Foundation contributor names had been surreptitiously employed by petitioners without the authority or knowledge of the Foundation and for which the Foundation was improperly charged; and

f. Asking questions of various witnesses insinuating a variety of misconduct on the part of petitioners and their co-defendants, which questions elicited expected denials, but as to which the District Attorney offered no proof.

4. Did the acceptance of Fadell's midtrial change of plea, the District Court's informing the jury thereof, the District Attorney's seating (unknown to petitioner's counsel) of Fadell in the spectators' benches in the courtroom during cross-examination of petitioner A. L. Koolish, the District Attorney's asking questions of Messrs. P. H., David and A. L. Koolish, suggesting that meetings with respect to

payment of kickbacks had been attended by A. L. Koolish, Fadell and Kline, and the District Attorney's tactics in the presence of the jury which served to imply possession on his part of wax disc recordings (and a typewritten transcript) of telephone conversations between A. L. Koolish and Fadell with respect to said alleged agreement to pay "kickbacks", serve to violate petitioners' rights under the Confrontation, Due Process and Jury Trial clauses of the Fifth and Sixth Amendments?

5. Under the circumstances of this case, were petitioners said rights of Confrontation, Due Process, and Fair Trial by Impartial Jury violated when the District Court (a) permitted co-defendant Fadell, after three weeks of trial, to withdraw his plea of not guilty to all sixteen counts of the indictment and plead guilty to but one of those counts upon agreement that the remaining fifteen counts (including the conspiracy count) would be dismissed; and (b) advised the jury thereof (saving, however, the agreement to dismiss the other counts of the indictment) but strongly cautioned the jury that they were not to consider the guilty plea as evidence against petitioners?

6. Did the massive, provocative and prejudicial pretrial newspaper, radio and television publicity that was persistently and repeatedly disseminated throughout the District of Minnesota during a period of three years preceding the trial (some of which was released by the District Attorney virtually on the eve of trial) so prejudice or otherwise affect and condition the inhabitants as to make it unlikely that petitioners could or did obtain twelve fair and impartial jurors?

7. Did the *voir dire* examination of the prospective jurors conducted exclusively by the learned trial judge serve reasonably to exclude from the trial jury all prospective jurors

who had or might have been adversely affected or conditioned by the massive, persistent pretrial publicity and also afford counsel for petitioners sufficient information respecting prospective jurors so as to enable them intelligently to exercise petitioners' peremptory challenges?

8. Viewed in the light of all of the circumstances of this case was the District Attorney's rebuttal argument so inflammatory, and otherwise prejudicial and improper, as to lead reasonably to the conclusion that the jury in reaching its verdict considered and gave weight to alleged facts as to which there was no competent evidence in the record and so as to inflame the jury against petitioners?

9. Did the Court of Appeals in effect put petitioners to trial in that Court and thus deprive them of their right to trial by jury guaranteed them by the Sixth Amendment when it held that the cautionary instructions given to the jury by the learned District Judge respecting the conduct of the District Attorney during the trial served to remove the prejudicial effect thereof upon the jury and, therefore, the jury must have based its verdict solely upon the competent evidence in the record, uninfluenced by passion, prejudice, incompetent evidence or alleged facts volunteered by the District Attorney?

CONSTITUTIONAL PROVISIONS, STATUTES OR RULES INVOLVED.

This case involves the Fifth and Sixth Amendments to the Constitution of the United States and Rules 21(a) and 29(a) of the Federal Rules of Criminal Procedure, 18 U.S.C., Rules 21 and 29, the full texts of which are set out in Appendix F. (App. 88 to 89.)

STATEMENT OF THE CASE.

Petitioners Abraham L. Koolish and David F. Koolish, father and son of Chicago, Illinois, were the owners and operators of several businesses which conducted direct mail solicitations for contributions for the Sister Elizabeth Kenny Foundation, Inc. (hereinafter "Kenny"), a Minnesota charitable corporation which had its national headquarters in Minneapolis and operated polio hospitals and clinics in that city and elsewhere. Petitioner John B. Carnell of Chicago was an employee of the Koolishes, who serviced the Kenny account. Petitioners were indicted with the following persons: Marvin L. Kline, a former alderman and mayor of Minneapolis and the Executive Director of Kenny; Fred Fadell of Minneapolis, the owner and operator of Fred Fadell and Associates, an independent public relations and advertising agency, retained by Kenny; J. George Zimmerman, a Minneapolis certified public accountant, who was engaged by Kenny to perform independent audits of its books and render financial statements; and Philip G. Rettig of Chicago, who was for a time president of New Century Corporation, which was owned by petitioners Abraham L. and David F. Koolish. (R. 1-2.)

The indictment consisted of sixteen counts the first fifteen of which charged all defendants with having devised and having intended to devise a scheme and artifice to defraud and to obtain money and property from Kenny, its contributors and prospective contributors by means of false and fraudulent pretenses, representations and promises, and use of the mails in furtherance thereof, in violation of Section 1341 of Title 18, United States Code (18 U.S.C. § 1341). (R. 1-17.) The sixteenth count charged a conspiracy participated in by all defendants to commit mail fraud in violation of Section 371, Title 18, United States Code (18 U.S.C. § 371). (R. 17-20.)

The scheme to defraud alleged in the indictment was in substance that by bribery of Kenny Foundation personnel, particularly co-defendants Kline and Fadell, and by other devious and fraudulent means, petitioners would and did gain and hold possession of and secretly employ the Kenny Foundation's list of contributors to petitioners' financial advantage, conceal from the Kenny Foundation Directors and contributors the true costs of the mail solicitation campaign services conducted by petitioners and their companies, the use by them of corporate fronts or shells to prevent the Kenny Directors and contributors from learning the true identities of petitioners as the actual operators of the campaigns, and the realization by them of excessive profits as a result of all of the foregoing.

Prior to the trial petitioners moved (1) for a severance from the Minneapolis defendants and (2) to transfer the case from the District of Minnesota on the ground that massive, provocative and adverse pre-trial publicity persistently disseminated in the District of Minnesota through newspapers circulated in the District, as well as through radio and television broadcasts, for approximately two years preceding the filing of the motion had so prejudiced and otherwise conditioned the community and its citizens that petitioners could not obtain a fair trial in the District. (R. 72-73; 117-124.) The events which gave rise to that persistent publicity are set out chronologically below.*

March through June 1960 — Various news stories and broadcasts respecting the Minnesota Attorney General's (Miles W. Lord, Esq. until mid-May and Walter F. Mondale, Esq. thereafter) investigation of Kenny Foundation affairs, with particular reference to participation therein of Kline, Fadell, Zimmerman and these petitioners. (R. 125-131.)

June 27, 1960 — Same with respect to the Minnesota Attorney General's Report of the investigation. (R. 132-135.)

The motions for severance and to transfer were denied. (R. 107; 300-304.)

The trial before the learned District Judge and a jury began March 19, 1963 and concluded over ten weeks later on May 29, 1963. At the outset petitioners' challenge to the array of jurors and the renewal of their motion to transfer based upon prejudicial publicity were denied. (T. 6.)

Pursuant to the practice obtaining in the Minnesota District the trial judge conducted the entire *voir dire* examination of the prospective jurors. Also pursuant to that practice and in advance of the opening of the trial, petitioners submitted a list of 79 questions which they requested be put to the prospective jurors by the court. (T. 12; S.R. 1-5.) Many of these questions were ignored

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(Footnote continued)

April 1960 through March 1961 — Various articles, news stories and broadcasts with respect to the reorganization of Kenny Foundation to meet sweeping charges and recommendations made in Attorney General's Report. (R. 136-155.)

July 1960 — Stories, reports and broadcasts as to the convening and thereafter the proceedings before the Hennepin County (Minneapolis area) grand jury investigation of Kenny Foundation affairs. (R. 156-158.)

July 29, 1960 — Publicity respecting Hennepin County grand jury report upon its investigation of Kenny Foundation affairs. (R. 159-164.)

July 29, 1960 — Publicity respecting Hennepin County grand jury indictment of co-defendant Marvin L. Kline for grand theft from Kenny Foundation. (R. 165-168.)

August through October 1960 — Publicity through all media respecting institution of proceedings against co-defendant J. George Zimmerman to effect revocation of his license as a Certified Public Accountant and the proceedings in respect thereto before the State Accountancy Board all upon petition of Minnesota Attorney General (R. 235-246.)

by the trial judge despite renewed requests during the course of the *voir dire* examination that they be asked. Petitioners objected to the *voir dire* examination on the ground that it afforded them so little information concerning the prospective jurors that they were unable intelligently to exercise their peremptory challenges. (T. 45; 125-128.) Many of the questions submitted by petitioners but which the District Judge declined to put to prospective jurors were designed to test the impact of pre-trial publicity on those jurors. (T. 127; S.R. 3.)

The *voir dire* examination of 48 regular and alternate jurors was completed in less than one day. (T. 23-157; 165.)

After three weeks of trial, defendant Fred Fadell announced that he wished to change his plea from not guilty to guilty. (T. 3068.) Up until that time Fadell and his counsel had been active participants in the defense of the

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(Footnote continued)

October 1960 — Publicity through all media respecting commencement of Federal Grand Jury investigation into the affairs of the Kenny Foundation and the participation therein of co-defendants Kline, Fadell, Zimmerman and these petitioners. (R. 257-259.)

November 1960 and following months into mid-1961 — Publicity in all media respecting civil suit commenced by the Minnesota Attorney General in Hennepin County District Court against Chicago defendants, and various proceedings thereafter had in that Court, the United States District Court in Minneapolis, and the United States District Court in Chicago. Suit filed day or two prior to General Election, at which Minnesota Attorney General was candidate for reelection. The action was removed to the United States District Court. Motion for remand was heard and denied after hearings. Cause was transferred to United States District Court in Chicago and thereafter dismissed and new suit by Sister Elizabeth Kenny Foundation was then filed in the United States District Court in Chicago. (R. 249-256.)

case. Counsel for petitioners strenously objected to the allowance of the change of plea at that late date. In the alternative, it was urged that should Fadell be granted leave to change his plea, the remaining defendants should be granted a severance, a mistrial, a change of venue and a continuance. (T. 3116-3121, 3131.) They also requested that in the event the change of plea was accepted, the jurors not be told of it. (T. 3131.)

The government urged that the jurors be advised of the change of plea. The United States Attorney expressly represented that Fadell would testify for the government and the jurors would then learn of his plea. (T. 3141, 4036.)

The court overruled all of defendants' objections and suggestions and granted leave to Fadell to plead guilty to Count VI. (T. 3223-3233.) In exchange for Fadell's guilty

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(Footnote continued)

January through February 1961 — Publicity through all media respecting trial (verbatim portions of which were printed in newspapers and quoted in broadcasts) of Grand Theft indictment of co-defendant Marvin L. Kline by Hennepin County Grand Jury. (R. 177-226.)

March through April 1961 — Publicity through all media respecting motions for new trial in Kline criminal case, the sentence of Kline, and commencement of his appeal. (R. 227-232.)

January through April 1961 — Publicity respecting introduction in, sponsorship by Minnesota Attorney General, and ultimate passage of charities' solicitation legislation by Minnesota legislature, with attendant references to Kenny Foundation affairs. (R. 293-298.)

August 1961 through January 1962 — Publicity through all media of convening by Miles W. Lord, former Minnesota Attorney General who had in the meantime been appointed United States Attorney, of Federal Grand Jury to conduct new investigation into the affairs of the Kenny Foundation and the participation therein of Kline, Fadell, Zimmerman and these petitioners. (R. 260-274.)

plea the government agreed that the remaining 15 counts (which included the conspiracy count) of the indictment would be dismissed at the time of sentencing. (T. 3238-3239.)* The jurors were immediately informed of Fadell's change of plea (but not of the agreement of the United States Attorney to dismiss all counts other than Count VI) and they were admonished not to consider the plea of guilty to Count VI as evidence that a crime had been committed or that any of the other defendants were guilty as charged. (T. 3240-3241.)

Petitioners through their counsel sought to memorialize all of the facts and circumstances leading up to and concerning Fadell's change of plea. To this end a motion was made that petitioners' counsel be permitted to examine Fadell, the United States Attorney, the first assistant United States Attorney and the postal inspectors who aided the prosecution. This motion was denied. (T. 8288, 8297.)

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*Accordingly, those counts were dismissed on September 13, 1963. (T. 35.)

(Footnote continued)

January 30, 1962 — Publicity through all media respecting the return of the indictment in this cause by the Federal Grand Jury. (R. 275-277.)

February 1962 — Publicity through all media respecting the arraignment of these petitioners and their co-defendants in that cause. (R. 278-283; 985.)

April 1962 — Publicity through all media respecting motions of defendants for severance, transfer and quashing of indictment. (R. 721-722; 745-749; 814-815; 838-840; 918-919.)

May through June 1962 — Publicity respecting hearings upon and the ultimate denial of defendants' aforesaid motions. (R. 750; 841-845; 851-852; 865-873; 921-922; 962; 970; 986.)

Defendants moved for judgment of acquittal and dismissal of the indictment at the close of the government's case in chief, and again at the close of all the evidence. (R. 661-662; T. 8283-8287.) The motions were denied. (T. 5060; R. 1697.)

Prior to submission of the case to the jury the government withdrew Counts VI, VII, VIII and X and Overt Acts 1, 3, 4 and 14 from consideration by the jury. (T. 4998, 8254, 8319.)

The jury found all of the defendants guilty of the conspiracy charged in Count XVI. Petitioners Abraham L. Koolish and David F. Koolish were found not guilty on

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(Footnote continued)

August 1962 — Publicity through news and broadcasting media respecting hearings upon and proceedings with respect to setting of cause for trial. (R. 816; 853-854; 874; 944-945; 987.)

October through November 1962 — Publicity in news and broadcasting media throughout 1962 General Election Campaign in Minnesota, including full page advertisements, speeches and broadcasts by Attorney General Walter F. Mondale, who was a candidate for reelection in that campaign, praising Mr. Mondale's conducting of Kenny Foundation investigation, his successful sponsorship in Minnesota legislature of charitable solicitation legislation, his prosecution of and conviction of Marvin L. Kline for Grand Theft, and his successful maintenance of his petition for revocation of Zimmerman's CPA license. This publicity included full page advertisements in the four metropolitan dailies in the St. Paul - Minneapolis area, political speeches by Mr. Mondale, and at least seven television and thirty-eight radio spot announcements. (R. 965; 972-977; 988-993; 1002-1015; 1027; 1029-1032.)

November 1962 — Publicity respecting resetting of this cause for trial. (R. 946; 1016.)

December 1962 — Publicity respecting further resetting of cause for trial. (R. 817-818; 855; 875-876; 923-924; 947; 978; 1017.)

seven counts of mail fraud, having been found not guilty on Counts III, V, XI & XII. Petitioner John B. Carnell was found guilty on eight counts of mail fraud, having been found not guilty on Counts III, V and XI. Defendant Kline was found guilty on nine counts of mail fraud, having been found not guilty on Counts V and XI. Defendant Zimmerman was found guilty of mail fraud only as charged in Count IX. (R. 1066-1070.)

Petitioners' motion for new trial, together with all of the motions which were taken under advisement at the close of all the evidence, were denied by the learned District Judge by written opinion, (App. C. pp. 47-86) which is reported in 221 F. Supp. 776. (R. 1576-1593, 1665-1697.)

(Footnote continued)

December 25, 1962 — Eve of trial feature article and story in Minneapolis Star about use of mail fraud statute by Federal authorities as device to "trip U. S. racketeers" in which United States Attorney Miles W. Lord, Esq. was quoted as characterizing "the alleged $10 million bilking of Kenny funds as among the 'greatest frauds in American history'." (R. 948.)

January 1963 — Publicity respecting resetting of cause for trial on March 19, 1963. (R. 950; 1018.)

March 18, 1963 — Publicity in Minneapolis-St. Paul dailies and on radio and television respecting trial to commence on following day. (R. 846; 994.)

The foregoing items of pre-trial publicity are set forth in detail in the exhibits to Defendants' pre-trial motion to transfer cause on the ground of prejudice of the inhabitants of the Minnesota District because of massive repeated prejudicial publicity and like subsequent updating motions and affidavits.

The various newspaper stories repeated and rehashed the Kenny Foundation event regardless of the nature of the occurrence (i.e., setting of trial dates, rulings on motions, etc.) that stimulated the news report.

Petitioners Abraham L. Koolish, then 71 years of age, (T. 8023) and his son, David F. Koolish, then 43 years of age, (T. 6380) were each sentenced to two consecutive five-year terms of imprisonment, fined $17,000 and ordered to pay $7,479.76 costs of prosecution. (R. 1707, 1708, 1743, 1776.)

Petitioner John B. Carnell, then 59 years of age, (T. 6891,) was sentenced to a term of five years in prison. (R. 1709.) Defendant Kline was sentenced to two consecutive five-year prison terms. (R. 1705.) Defendant Zimmerman's five-year term of imprisonment was suspended and he was placed on probation for the period of time. (R. 1710.)

Defendant Fadell, on his guilty plea to Count VI, was sentenced to but one year and one day imprisonment. At his request his sentence was stayed 30 days. (R. 1706.) During this stay he moved for a further stay of two years or in the alternative for a suspended sentence and probation. (S. R. 9-14.) The government did not oppose Fadell's motion and disposition of it was continued for a period of 18 months from October 14, 1963. (S. R. 7.)

REASONS FOR GRANTING THE WRIT

I.

THIS CASE PRESENTS AN IMPORTANT QUESTION RESPECTING THE INTERPRETATION AND APPLICATION OF RULE 29(A) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE.

A.

WHAT IS THE SCOPE OF THE EVIDENCE WHICH A COURT OF APPEALS MAY CONSIDER IN DETERMINING WHETHER A TRIAL COURT PROPERLY DENIED A MOTION FOR ACQUITTAL MADE AT THE CLOSE OF THE GOVERNMENT'S CASE IN CHIEF UNDER RULE 29 (a) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE?

At the close of the government's case in chief petitioners moved under Rule 29(a) of the Federal Rules of Criminal Procedure for judgments of acquittal on the premise that the government had failed to sustain its burden of proving a prima facie case. The motion was denied. The defense thereupon put in its case and the government offered its rebuttal evidence. Petitioners again moved for acquittal at the close of all the evidence. The motion was taken under advisement pending the jury verdict and subsequently denied.

Petitioners contended on appeal below (C.A.R. 44) that in reviewing the denial of the motion for acquittal made at the close of the government's case in chief, the Court of Appeals was required by the provisions of Rule 29(a) of the Federal Rules of Criminal Procedure (App. F., p. 89) to restrict itself to a consideration of the evidence that was in the record at the time the motion was made, and that it could not consider or give any weight or consideration to evidence subsequently introduced by the defendants dur-

ing their case (in particular their testimony) or by the government in rebuttal; and that for the District Court or the Court of Appeals to consider and give weight to defendants' evidence would be to violate defendants' rights under the self-incrimination clause of the Fifth Amendment.

However, it would appear that the Court of Appeals did not apply the rule, for in reciting that the government made out a *prima facie* case sufficient to withstand defendants' motion to acquit the Court states (App. A, pp. 11-12):

> "Among other things, however, the jury could, and undoubtedly did, find the following:
>
> 1. Unbeknownst to the directors of the Kenny Foundation, the Koolishes through Empire Industries, Inc., Empire Associates and New Century paid $359,200 to Fred Fadell and Associates during the period from February 28, 1952, through May 31, 1960. Fred Fadell, in turn, paid Marvin Kline $113,750 from December 1952 through May 1957. The inference that the other defendants knew of the division with Kline *was justified through Carnell's testimony that he learned that Fadell and Associates was retaining Kline as a 'consultant' and that he had so advised Phil Koolish.* The close association and cooperation between the various parties supports the conclusion of complete awareness of this pay-off." (Emphasis ours.)

and at App. A., p. 16:

> "20. The 1959 fall mailing of 12,000,000 pieces could have been performed by a Minneapolis letter shop at a savings of $27.94 per thousand less than the $67.50 per thousand charged by New Century Corporation, or a total saving to the Foundation of approximately $335,304."

Carnell's testimony was adduced on defendants' proofs. The evidence respecting the Minneapolis letter shop was adduced by the government on its rebuttal.

The heart of the scheme charged in the indictment was that petitioners through their companies paid money to defendant Fadell, Kenny's public relations director, and that Fadell in turn split a portion of this money with defendant Kline, Kenny's executive director. The government alleged that the purpose of the payments was to enable petitioners to charge excessive prices for their services and thereby reap large profits.

Petitioners contended that they retained Fadell's public relations agency in good faith to render national public relations services to promote Kenny, a relatively unknown charity that had to compete with the National Foundation for Infantile Paralysis (March of Dimes) for charitable contributions and in doing so advance a new and controversial method of treatment of polio. The government during its case in chief attempted but failed to prove knowledge on the part of petitioners that Fadell was making payment to Kline out of the payments for national public relations services petitioners made to Fadell and Associates. On appeal, petitioners contended that lack of proof of this knowledge on the part of petitioners was fatal to the government's case in chief. Accordingly, the reliance by the Court of Appeals on Carnell's testimony which was not adduced on the government's case in chief was at odds with Rule 29(a) and constituted a violation of defendants' rights under the self-incrimination clause of the Fifth Amendment. *Cephus* v. *United States,* 324 F.2d 893 (D.C. Cir. 1963); *Franklin* v. *United States,* 330 F.2d 205, 208 (D.C. Cir., 1964.)

Petitioners also contended the government during its case in chief had failed to prove that the prices which they had charged Kenny were in excess of what any other mailers would have charged for similar materials and services.

In his rebuttal argument to the jury (App. 95) the United States Attorney asserted that this was the most important element in the government's case against petitioners. The Minneapolis letter shop proof, quoted above, relied upon by the Court of Appeals was introduced not on the government's case in chief but on rebuttal over defendants' vigorous objection (G. Ex. 656; T. 8229.) Accordingly, it could not advance the government's case in chief and the Court of Appeals erred in considering it.

B.

THERE APPEARS TO BE A CONFLICT IN PRINCIPLE BETWEEN THE CIRCUITS ON THE CONSTRUCTION AND APPLICATION OF RULE 29(a) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE.

As heretofore demonstrated, the Court of Appeals for the Eighth Circuit considered evidence received after the government had completed its case in chief in ruling on the propriety of the denial of defendants' motion for acquittal made at the close of the government's case. However, the Court of Appeals for the District of Columbia in *Cephus* v. *United States*, 324 F.2d 893 (D.C. Cir. 1963) and *Franklin* v. *United States*, 330 F.2d 205, 208 (D. C. Cir. 1964) has held that Rule 29(a) of the Federal Rules of Criminal Procedure requires that on review of an order denying a motion for acquittal a Court of Appeals must limit itself to a consideration of the evidence in the record at the time the motion for acquittal is made.

This Court ought to resolve this important issue as to the correct construction and application of Rule 29(a) of the Federal Rules of Criminal Procedure.

II.

UNDER ALL OF THE CIRCUMSTANCES OF THIS CASE PETITIONERS' RIGHTS UNDER THE CONFRONTATION, DUE PROCESS OF LAW AND FAIR TRIAL BY IMPARTIAL JURY CLAUSES OF THE FIFTH AND SIXTH AMENDMENTS WERE VIOLATED BY THE DISTRICT ATTORNEY'S PERSISTENT USE THROUGHOUT THE TRIAL OF INSINUATING QUESTIONS ON DIRECT AND CROSS-EXAMINATION THROUGH WHICH HE ASSERTED THE EXISTENCE OF PROOF OF GRIEVOUS MISCONDUCT ON THE PART OF PETITIONERS AND THEIR CO-DEFENDANTS, HIS RESORT TO VARIOUS ARTIFICES IN THE COURTROOM IN THE PRESENCE OF THE JURY THROUGH WHICH HE BROUGHT THE IMAGE OF FADELL AND HIS MID-TRIAL CHANGE OF PLEA BEFORE THE JURY AS EVIDENCE AGAINST PETITIONERS WITHOUT CALLING OR INTENDING TO CALL FADELL AS A WITNESS, AND HIS INFLAMMATORY, MISLEADING AND IMPROPER REBUTTAL ARGUMENT TO THE JURY.

THE LEARNED DISTRICT JUDGE UNWITTINGLY AFFORDED MEANS IN THIS REGARD TO THE DISTRICT ATTORNEY BY ACCEPTING FADELL'S MID-TRIAL CHANGE OF PLEA AND INFORMING THE JURY THEREOF ON THE REPRESENTATION OF THE DISTRICT ATTORNEY THAT HE INTENDED TO CALL FADELL AS A WITNESS.

A.

The Court of Appeals characterized the conduct of the United States Attorney as "over zealousness." (App. 37.) The learned District Judge sought by strong instructions

to the jury to accomplish the impossible feat of inducing the jury to erase from their minds the improper conduct of and suggestions of facts made to them by the District Attorney.*

Petitioners contend that a consideration of the entire record cannot lead to any conclusion but that this "overzealousness" and improper conduct violated petitioners' rights to a fair trial before an impartial jury, to confrontation and cross-examination of their accusers, and due process of law guaranteed them by the Fifth and Sixth Amendments.

1.

FAILURE TO PROVE INCRIMINATING FACTS SUGGESTED IN PROSECUTOR'S QUESTIONS.

Many times during the trial various witnesses, particularly petitioners or their employees, were asked questions by the United States Attorney through which he insinuated in striking detail that certain conspiratorial meetings had been held, that prejudicial and incriminating admissions had been made by various defendants, Fadell

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*As to the ineffectiveness of such instructions, see *Tucker* v. *Henniker*, 41 N.H. 317, 324-326 (1860); *People* v. *Ah Len*, 92 Cal. 282, 28 Pac. 286, 287 (1891); *Dunn* v. *United States*, 307 F.2d 883, 886 (5th Cir. 1962); *Krulewitch* v. *United States*, 336 U.S. 440, 453 (1949) (Jackson, J., concurring); *United States* v. *Antonelli Fireworks Co.*, 155 F.2d 631, 656 (2d Cir. 1946) (Frank, J., dissenting); *United States* v. *Grayson*, 166 F.2d 863, 871 (2d Cir. 1948) (Frank, J., concurring); *People* v. *McElvey*, 260 Pac. 397 (Cal. 1927); *Patterson* v. *State*, 126 So. 420, 422 (Ala. 1930); *People* v. *Anthony*, 196 Pac. 47, 49-50 (Cal. 1921); *DeLuna* v. *United States*, 308 F.2d 140, 154 (5th Cir. 1962); *United States* v. *De Dominicus*, 332 F.2d 207, 210 (2d Cir. 1964); *Walbert* v. *Farina*, 192 A.2d 404, 409 (Pa. 1963).

and Kline in particular, or conversations had been had by or with them or in their presence, and that incriminating acts had been committed.

In each instance the witness denied the accusation and insinuation. The United States Attorney did not thereafter offer any testimony or evidence to prove any of the alleged facts so carefully and prejudicially staged and insinuated. The prejudicial effect upon a lay jury of this type of improper conduct has been universally recognized by all courts.

Space does not permit setting out in this petition all of the instances in the record where this type of activity occurred. Suffice it to say that it occurred so often and the facts so carefully suggested were considered by petitioners' counsel to be of such a prejudicial and incriminating nature that they felt constrained to request a mistrial (Tr. 8264-8272) and the learned District Judge sought by extended instructions to the jury to induce the members to erase the prejudicial events from their minds.

It is not too difficult upon consideration of the entire record to perceive that the supposed primary source of the purported incriminating facts and circumstances which the prosecutor so carefully staged was defendant Fred Fadell. Yet the prosecutor declined to call Fadell as a witness, much preferring to elicit Fadell's "testimony" through himself by using the device of asking questions containing unproved incriminating details and which he knew would elicit denials.*

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* Even the learned and experienced District Judge despite his disciplined mind was led by the trial tactics of the District Attorney to believe that he could prove the insinuations inherent in the District Attorney's questions. As late as three months after the trial had ended, and in his written opinion in support of his ruling on

It was the insinuating questions, not the expected negative responses thereto, which were important to the prosecutor. This tactic served only to deny petitioners a fair trial. *People* v. *Wells*, 100 Cal. 459, 462, 34 Pac. 1078, 1079-80 (1898)); *State* v. *Flowers*, 114 N.W.2d 78, 81 (Minn. 1962); *State* v. *Silvers*, 40 N.W.2d 630, 635 (Minn. 1950.)

(Footnote continued)
petitioners' motion for new trial he stated his belief that the District Attorney, although he failed to do so on the trial, could have proved the alleged facts improperly suggested by his questions (App. C., p. 74):

> "This fact is recited in order to suggest that it is not unlikely that if the prosecutor were afforded the opportunity, he could have proved some or maybe many of the inferences contained in the questions asked on direct and cross-examination to which defendants' counsel make objection.
>
> "Fred Fadell did not testify. The decision of the United States Attorney not to call him—although he several times stated his intention to do so—may have been based on the many vigorous anticipatory objections by defense counsel to the calling of Fadell. But, had Fadell been called, it is not improbable that his testimony would have proved many of the inferences to which objection is made."

We hardly need suggest that the lay jurors must have been of like view during the course of their deliberations that followed immediately the close of the evidence (*viz.*, that the District Attorney's unproven suggestions to the jury could have been proven by him.)

This is the very evil erosion, tarnishing and weakening of fair trial, due process of law, trial by jury, and right to confront and cross-examine witnesses that the courts of this nation have uniformly decried. *People* v. *Ah Len*, 92 Cal. 282, 28 Pac. 286, 287 (1891); *Douglas* v. *Alabama*, 33 Law Week 4304 (April 6, 1965); *Tucker* v. *Henniker*, 41 N.H. 317, 324-326 (1860); *United States* v. *Grayson*, 166 F.2d 863, 871 (2d Cir. 1948) (concurring opinion of Judge Frank); *People* v. *Anthony*, 196 Pac. 47, 49-50 (Cal. 1921); *State* v. *Nelson*, 181 N.W. 850, 857 (Minn. 1921).

As late as April 5, 1965, this Court held that like tactics on the part of a prosecutor served to violate rights of Confrontation guaranteed all defendants by the Sixth Amendment. *Douglas* v. *Alabama,* 33 Law Week 4304 (April 6, 1965.) That such conduct also violated petitioners' rights of due process of law and fair trial is equally obvious.

2.

THE DISTRICT ATTORNEY'S INFLAMMATORY AND PREJUDICIAL REBUTTAL ARGUMENT DEPRIVED PETITIONERS OF A FAIR TRIAL BEFORE AN OPEN MINDED IMPARTIAL JURY.

The rebuttal argument of the United States Attorney was contrived and designed to stampede the jury into returning guilty verdicts based on passion and prejudice and on the District Attorney's insinuating suggestions of facts rather than competent evidence adduced in open court. His rebuttal argument was not spontaneous; it was planned. It was the culmination of all of the unfair conduct on the part of the prosecutors that permeated the whole trial.

As an aid to this Court, petitioners have printed the entire rebuttal argument as Appendix G to this Petition. (App. 90 to 105.) Some examples of the United States Attorney's improper rebuttal argument are the following:

(1) By telling the jury that they could rely upon the representations made by him in his questions, App. G. p. 91, "We sometimes have even identified—counsel have accused us of leading questions, but I think it's made for a better understanding of the case."

(2) By improperly testifying to his inflammatory and highly prejudicial conception of what petitioner A. L.

Koolish "saw" in his early visit to the Kenny Foundation in Minneapolis. App. G. pp. 91-92.

(3) By making reference to Mrs. Duerr an employee of petitioners whom he failed to call as a witness but had named in an insinuating question as having advised petitioner David Koolish that Kenny Foundation contributor list names were being surreptitiously used by petitioners. App. G. p. 92.

(4) By dwelling upon the wealth of petitioners. App. G. p. 102.

(5) By referring to other charities for which petitioners had mailed, particularly those which minister to persons with unfortunate physical afflictions, such as "the blind, the poor, the war orphans, the brain injured." (App. G, p. 96.) Evidence concerning charities was admitted over objections solely for the purpose of purportedly showing intent. Mention of these charities was the same type of argument denounced in *Greenberg* v. *United States,* 280 F.2d 472, 474 (1st Cir. 1960).

(6) Associating himself with the jury because both were under oath. (App. G. p. 104.) *Steele* v. *United States,* 222 F.2d 628, 631 (5th Cir. 1955.)

(7) Mentioning the irrelevant and unproven facts respecting the time and expense to the government supposedly necessitated by Petitioners' wrongdoings. (App. G. p. 104.) *Windisch* v. *United States,* 295 F.2d 531, 533-534 (5th Cir. 1961); *People* v. *Talle,* 111 Cal. App. 2d 650, 245 P. 2d 633, 647 (1952).

3.

OTHER PREJUDICIAL PROSECUTOR MISCONDUCT.

In addition to the foregoing indiscretions, the United States Attorney made improper statements in the presence of the jury; he asked at least 298 argumentative questions to which objections were sustained, 90 of which occurred after he was admonished by the learned trial judge to desist from so doing; he improperly made references to several witnesses' grand jury testimony (T. 2314, 2321, 2804, 2853, 3456-3458, 3471); and unknown to petitioners he twice procured defendant Fadell to be present in the spectator section of the courtroom in full view of the jury after Fadell had changed his plea to guilty and during the District Attorney's examination of witnesses in respect of supposed nefarious meetings between petitioners and Fadell (T. 8064.)

Petitioners contend that when the totality of the conduct the United States Attorney throughout the trial of this cause is considered, it is manifest that petitioners were deprived of a fair trial. This is a case in which "the United States prosecuting attorney overstepped the bounds of that propriety and fairness which should characterize the conduct of such an officer in the prosecution of a criminal offense . . ." *Berger* v. *United States*, 295 U. S. 78, 84 (1935).

III.

THIS CASE PRESENTS OTHER IMPORTANT QUESTIONS OF FEDERAL CONSTITUTIONAL LAW.

A. THE MASSIVE PREJUDICIAL PRETRIAL PUBLICITY.

There is presented the question whether petitioners were denied a fair trial by (1) subjecting them to trial, over their objection, in a community which for nearly three years had been saturated with adverse, prejudicial newspaper, radio and television publicity about them and their co-defendants respecting the affairs of the Kenny Foundation and the petitioners' allegedly nefarious participation therein, and (2) by allowing one of their co-defendants to plead guilty after three weeks of court room participation on his part and his counsel in the trial and, over their objection, telling the jury of that change of plea.

The refusal of the trial court to grant petitioners' motion to transfer this cause for trial to a forum other than Minnesota ignored this Court's holding in *Rideau* v. *Louisiana*, 373 U. S. 723 (1963), that where an entire community has been exposed to persistent, pervasive, provocative, adverse publicity, prejudice will be conclusively presumed and due process of law requires a trial before a jury drawn from a community of people who had not been exposed to such publicity.

At the time the trial court denied petitioners' motion to transfer he did so on the ground that the motion was premature and that the proper time for determining whether an impartial jury could be secured in the District of Minnesota was the *voir dire* examination. (App. 46.) However, the *voir dire* examination all of which was conducted by the learned trial judge was insufficient to elicit the information needed to make that determination. His

refusal to ask the prospective jurors the questions submitted by petitioners' counsel in advance of trial concerning the adverse pretrial publicity and the jurors' exposure thereto, although twice expressly requested to do so, denied to petitioners the right intelligently to exercise their peremptory challenges, which right this Court stated was so important in *Pointer* v. *United States,* 151 U.S. 396, 408-409 (1894).

The United States Attorney was himself the source of some of the prejudicial information which was disseminated by the news media. On December 2 5, 1962, at which time this cause was set for trial on January 9, 1963, (which was less than three months prior to the actual commencement of the trial) there appeared in The Minneapolis Star, the Twin Cities' most widely circulated metropolitan daily, a feature story about how the mail fraud statute rather than the income tax statute had gradually come into use by the government to convict "racketeers". (R. 948.) The story, which prominently mentioned Al Capone and other nefarious characters, stated in part:*

> "Miles W. Lord, United States district attorney, said the shift of emphasis from use of the tax statute to the mail fraud statute in prosecuting racketeers has been gradual, but effective.
>
> It is the mail fraud statute under which Marvin L. Kline, one time mayor of Minneapolis and long time executive director of Sister Elizabeth Kenny Foundation, and several others will go to trial in Minneapolis Federal Court Jan. 9.

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*We have printed the entire feature story as Appendix H hereto, App. pp. 107 to 110.

> Lord has characterized the alleged $10 million bilking of Kenny funds as among the 'greatest frauds in American history'."

This type of conduct on the part of a prosecutor was recently the subject of a recommendation of the Presidential Commission to investigate the Assassination of President John F. Kennedy. (See Report, p. 27.) In addition, under Senate Bill 1802 introduced in the first session of the 88th Congress and approved, with changes, by the Judicial Conference of the United States, this conduct would be unlawful and subject the United States Attorney to punishment for contempt of court. (See 109 Cong. Rec. 11743-11744 and 1964 Mid-September Report of the Judicial Conference of the United States, pp. 84-85.) We also call to the Court's attention and ask it to take judicial notice of the recent (April 16, 1965) speech delivered to the Annual Meeting of the American Society of Newspaper Editors by the Honorable Nicholas Katzenbach, Attorney General of the United States, in which he announced limitations on information which federal prosecutors may release to the news media as to pending criminal cases. The statement attributed to the prosecutor at bar was at odds with these self-imposed limitations.

Not to be lost sight of is that during the political campaigns in the Fall of 1962 a few months before the trial cmmenced the pot was kept boiling by the then Attorney General of Minnesota throughout his campaign for reelection. He stressed his part in the revelations concerning the Kenny Foundation as the foremost theme in his speeches, his full page newspaper advertisements and his television and radio spot announcements.*

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* We have printed some of those speeches and announcements in Appendix I hereto App. pp. 110 to 111.

B. THE ACCEPTANCE OF FADELL'S MID-TRIAL CHANGE OF PLEA SERVED TO VIOLATE PETITIONERS' RIGHTS UNDER THE FIFTH AND SIXTH AMENDMENTS.

Petitioners were forced to trial in a community contaminated with adverse publicity and, upon denial of their motion for a severance from the Minneapolis defendants, with a co-defendant, Fadell, who, after posing as a bona fide defendant for three weeks, changed his plea to guilty to but one count of the indictment with the understanding that the other fifteen counts would be dismissed. Upon the prosecutor's representation that Fadell would appear as a witness, the jury was informed over petitioners' objection, of the guilty plea.

Fadell and his counsel participated with petitioners and their counsel in exercising the peremptory challenges that were allocated to all of the defendants as a group. Yet, Fadell was in reality a "spy" in the defendants' camp. Fadell's counsel, during the week preceding the plea (and after the "deal" had been made), freely stipulated to the introduction of evidence. The presence of Fadell and his counsel at the defense table with the full knowledge of the United States Attorney that he was conferring with and assisting him and that United States Attorney and Fadell and his counsel were working out a change of plea agreement (T. 3081, 3147-3150; 3157) denied to petitioners effective assistance of counsel guaranteed by the Sixth Amendment. Compare, *Massiah* v. *United States*, 377 U.S. 201 (1964); *Caldwell* v. *United States*, 205 F. 2d 879 (D.C. Cir. 1953); *Coplon* v. *United States*, 191 F. 2d 749, 757 (D.C. Cir. 1951); *Glasser* v. *United States*, 315 U.S. 60, 76 (1942); *Louie Yung* v. *Coleman*, 5 F. Supp. 702, 703 (S.D. Idaho 1934); and *Ex parte Rider*, 195 Pac. 965 (Calif. Dist. Ct. of Appeals 1920).

Subsequent to Fadell's change in plea the United States Attorney made full use of Fadell's cooperation with the government. He examined witnesses (particularly petitioners on cross examination) concerning alleged meetings and conversations with Fadell. The details of those meettings were carefully conveyed to the jury by the prosecutor's questions. Fadell was not called as a witness nor was there any attempt on the government's part otherwise to prove the alleged meetings and conversations.

C. THE COURT OF APPEALS, IN EFFECT, PUT PETITIONERS TO TRIAL IN THAT COURT AND THUS DEPRIVED THEM OF THEIR RIGHT OF TRIAL BY JURY.

The Court of Appeals held that the District Judge's cautionary instructions to the jury respecting the conduct of the District Attorney had the effect, in its opinion, of disabusing the minds of the members of the jury of the prejudicial effect, if any, of the conduc of the District Attorney; that the competent evidence bearing upon the guilt of petitioners was sufficient to sustain the verdict against petitioners; and that the members of the jury confined themselves to that evidence in considering their verdict.

Faced recently with like considerations in a case involving the effect on a defendant's right of trial by jury of prejudicial conduct on the part of a prosecutor the Supreme Court of Minnesota held that for a reviewing Court to reach the conclusion that cautionary instructions so irrigated the jurors' minds as to dissipate the prejudice, it "* * must hold that the guilt was conclusively proven. [and] This, in effect, is trying defendant in this [the reviewing] court, and depriving him of his right to trial by jury." *State* v. *Flowers,* 114 N.W.2d 78, 81-82 (1962).

Earlier the same court held that it was "unwilling to adopt a theory which in effect assumes that, where proof is strong, due process may be suspended." And that for a court of review to apply the so-called strong evidence of guilt doctrine despite prejudicial conduct on the part of the prosecutor is to erode defendant's basic rights of fair trial and thus "to deny the existence of the right." *State* v. *Reardon,* 245 Minn. 509, 73 NW 2d 192, 195 (1955).

The question is not whether guilt may be spelled out in the record, but whether guilt has been found by a jury according to principles of fair trial appropriate for criminal cases in the federal courts. *Bollenbach* v. *United States,* 326 U.S. 607, 614 (1946).

Whether defendants are guilty is irrelevant to the issue of whether they received a fair trial. *United States* v. *Fry,* 304 (F.2d 296, 298-299 (7th Cir. 1962).

CONCLUSION.

Petitioners respectfully ask that this Court issue its writ of certiorari to the Court of Appeals for the Eighth Circuit to review the judgment of that court entered in this cause.

Respectfully submitted,

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APPENDIX A

Opinion of the United States Court of Appeals for the Eighth Circuit, filed January 25, 1965:

Before VOGEL, VAN OOSTERHOUT and MEHAFFY, Circuit Judges.

VOGEL, Circuit Judge.

The appellants herein, Abraham L. Koolish, David F. Koolish and John B. Carnell, together with Marvin L. Kline, Fred Fadell, Philip G. Rettig and J. George Zimmerman, were indicted by a grand jury charged in fifteen counts with mail fraud, 18 U.S.C.A. § 1341,[1] and a single count of conspiracy to commit mail fraud, 18 U.S.C.A. § 371.[2] During the trial Philip G. Rettig was severed from the case due to illness. He is still under indictment and his trial is pending. All other defendants were found guilty by a jury of the conspiracy count and of various mail fraud counts, with the exception of Fred Fadell, who during the trial pleaded guilty to one count of mail fraud. Abraham L. Koolish and David F. Koolish were sentenced to five years' inmprisonment on Counts 2, 4, 9 and 16 (the conspiracy count), and five years' imprisonment on Counts 1, 13, 14 and 15, the second sentence to be served consecutively to and not concurrently with the first sen-

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[1] During the trial the government withdrew Counts 6, 7, 8 and 10, leaving but eleven counts of mail fraud.

[2] Sixteen overt acts were charged as supporting the conspiracy count. Of such sixteen, overt acts Nos. 1, 3, 4, and 14 were withdrawn by the government.

tence. Each was also fined $17,000 and ordered to pay the costs of prosecution, which totalled $7,479.76. They were found not guilty on Counts 3, 5, 11 and 12. Carnell was sentenced to a term of five years' imprisonment as a general sentence on Counts 1, 2, 4, 9, 12, 13, 14, 15 and 16, he having been found not guilty on Counts 3, 5 and 11. Kline was sentenced to serve five years' imprisonment on Counts 1, 2, 3, 4 and 9 and five years' imprisonment to be served consecutively thereto on Counts 12, 13, 14, 15 and 16. Kline was found not guilty on Counts 5 and 11. Zimmerman, who was found guilty on Counts 9 and 16 only, was sentenced to a term of imprisonment for five years but execution thereof was suspended and he was placed on probation for a period of five years. On the one count to which he pleaded guilty, Fadell was sentenced to a term of imprisonment for a period of one year and one day. Service of his sentence was stayed for 30 days, during which period he moved for further stay of commitment for two years to enable him to put his personal and business affairs in order or in the alternative to suspend execution of the sentence and place him on probation. Disposition of that motion has been continued for a period of 18 months.

Abraham L. Koolish, David F. Koolish, John B. Carnell and Marvin L. Kline appealed from the judgments of conviction. On July 27, 1964, Kline withdrew his appeal. The appellants herein, therefore, are only the two Koolishes and Carnell.

NAMED DEFENDANTS AND THE KENNY FOUNDATION

Appellants, with their co-defendants, were charged with conspiracy and with using the mails in furtherance of a scheme to defraud and obtain money and property by

means of false representations from the Sister Elizabeth Kenny Foundation, its contributors and prospective contributors. The conspiracy charged was alleged to have existed over a period from January 1, 1949, to January 30, 1962, the date on which the indictment was returned. The named defendants may be described as follows:

Marvin L. Kline, former mayor of Minneapolis, Minnesota, was, during the times involved, the Executive Director of the Sister Elizabeth Kenny Foundation.

Fred Fadell, of Minneapolis, Minnesota, was the owner and operator of Fred Fadell and Associates, a public relations and advertising agency which was retained by the Kenny Foundation to perform public relations and promotional services, officing with the Foundation, rent free, and being paid by the Foundation first on a semi-monthly and later on a monthly basis.

Abraham L. Koolish, of Chicago, Illinois, was financially interested in Empire Industries, Inc., Empire Associates, New Century Corporation and LeMarge Mailing Service Company, all of which conducted direct mail solicitations for contributions for the Kenny Foundation.

David F. Koolish, also of Chicago, Illinois, is the son of Abraham L. Koolish and together with his father was financially interested in the business entities which conducted the Kenny Foundation campaigns.

John B. Carnell, of Chicago, Illinois, was an employee of the Koolish companies who handled the Kenny Foundation account.

Philip G. Rettig, of Chicago, Illinois, was president of New Century Corporation during a portion of the indictment period.

J. George Zimmerman, of Minneapolis, Minnesota, was a Certified Public Accountant who was engaged by the Kenny Foundation to perform independent audits of its books and render financial statements.

The Sister Elizabeth Kenny Foundation (variously referred to herein as "Kenny" and "Foundation") was organized in 1943. Its purpose was the treatment and rehabilitation of youngsters stricken with infantile paralysis. The Foundation had various sources of income, including the patients themselves, March of Dimes Campaign, door-to-door solicitations, gifts, bequests, grants and mail solicitations. In 1949, the Foundation turned to the two Koolishes and Carnell to assist it in raising money through direct mail solicitation. During the period from 1951 through 1960 the Koolishes, their associates and organizations, raised something more than $22,000,000 from contributors. Of that, $9,000,000 or approximately 40% of each contributor dollar reached the Foundation. The mail campaigns produced only about 25% of the Foundation's income for the period 1952 to 1959.

THE ALLEGED SCHEME

The indictment alleged that the defendants devised a single all-inclusive scheme to obtain money by false pretenses from the Kenny Foundation and its contributors. With minor changes, the government accepts and we adopt the appellants' summary of the scheme as it was alleged in the detailed indictment. It consisted of ten material parts:

1. Kenny's Executive Director Kline and its public relations counsel Fadell awarded mail solicitation contracts to the Koolish companies (Empire Associates, Empire Industries, Inc., and New Century Corporation) without

obtaining competitive bids and at rates which provided "large profits" to the Koolish companies.

2. All of the defendants (except Zimmerman) caused the fall (as opposed to spring) mailing contracts between Kenny and the Koolish companies to contain provisions for refunds by the Koolish companies in the event that the mailing costs were less than the price agreed to in the contracts. However, this provision of the fall contracts was not fulfilled. Instead only "token refunds" were made and accepted because Kline and Fadell did not require audits to be made of the books of the Koolish companies to determine the amounts of the refunds due.

3. During the period 1952-1955 defendants A. L. Koolish, David F. Koolish, John B. Carnell and Philip G. Rettig "diverted" more than $350,000 of the proceeds realized from the mailing contracts to Kline and Fadell and concealed these facts from Kenney's directors, contributing agencies, licensing departments of states and cities, and the Kenny donors. The Koolish companies paid money to Fadell which Fadell thereafter divided with Kline. The payments to Fadell were recorded on the books of the Koolish companies as operating costs or costs of preparing Kenny's mailings.

4. Defendant A. L. Koolish purchased New Century Corporation (which participated in the Kenny mailing program) and he and his son, defendant David F. Koolish, concealed the ownership of it from Kenny, its donors and the public by appointing "dummy" directors and nominal stockholders. The two Koolishes designated Carnell and Rettig as officers of New Century and represented (a) that Carnell owned New Century and (b) that New Century was not associated with either the other Koolish companies or the two Koolishes themselves.

5. The Koolishes, Carnell and Rettig caused New Century to make gifts and to provide entertainment for Kline, Fadell and various other officers and directors of Kenny and charged the costs on New Century's books as costs of preparing mailings.

6. Kline, Fadell and Carnell arranged for Carnell to be paid $400 per month by Kenny as an administrative consultant from May 1, 1957, until March 1, 1960.

7. Kline and Fadell established a committee called the Special Events Committee which they dominated and controlled and together with Zimmerman falsely represented that this committee conducted the direct mail campaigns of Kenny.

8. Kline, Fadell and Zimmerman withheld audit statements of the Special Events Committee from Kenny directors, licensing departments of states and cities, Better Business Bureaus, contributing agencies and Kenny donors. Zimmerman prepared Kenny's consolidated audit reports which falsely stated the costs of the direct mail campaigns by reporting only a fractional part of the actual costs as "Costs of Fund Campaigns" and allocating the balance to "Costs of Therapist Training Operations; Medical Education and Training Programs; Public Education and Information Services; Promotion and Development of Additional Treatment Facilities; Grants for Medical Research; Publicity and Public Relations Operations, Provided Through National Headquarters".

9. Defendants Carnell and Rettig in the name of New Century Corporation contracted with Kline to do mailing and list maintenance for the Foundation and then caused these services to be performed by the LeMarge Mailing Service Company.

10. All of the defendants (except Zimmerman) caused the list of names of Kenny contributors to come into the possession of the Koolish companies and the Koolish companies rented these names to others and credited Kenny with only a fraction of the proceeds of the rentals, the major portion thereof being paid to the Koolish companies.

FALSE REPRESENTATIONS

All of the defendants were alleged to have made false representations, pretenses and promises to the Foundation, the contributing agencies, the licensing departments of states and cities, donors, contributors and prospective contributors to the effect that:

1. The actual costs of the mail campaigns to Kenny were accurately and completely shown on Zimmerman's consolidated audit reports.

2. Kenny's direct mail campaigns were conducted by the Special Events Committee.

3. The Special Events Committee was an entity separate from the Kenny Foundation.

4. The Koolish companies (excepting Empire Associates and Empire Industries, Inc.) performed mailing services for Kenny at cost.

5. The Koolish companies (excepting Empire Associates and Empire Industries, Inc.) were the low bidders on the mailing services and materials for Kenny.

6. Carnell was the owner of New Century and was not associated with A. L. Koolish or David Koolish in the corporation.

7. A. L. Koolish and David Koolish held no ownership or control in New Century.

8. Carnell performed administrative consultant services for the Foundation in return for fees of $400 a month paid by the Foundation.

Each mail fraud count alleged the use of the mails for the purpose of executing the scheme and artifice to defraud.

Count 16, the conspiracy count, alleged some 16 overt acts committed by the defendants in furtherance of the conspiracy. Overt acts numbered 1, 3, 4 and 14 were withdrawn. The remainder are summarized as follows:

2. Abraham L. Koolish directed a nominee, Manuel Rosner, to purchase stock of New Century Corporation.

5. Defendant Kline authorized payments to John B. Carnell.

6. Defendants Carnell and Rettig paid approximately $630 for World Series tickets, transportation and entertainment, causing this expenditure to be entered on the books of New Century as costs of the 1957 fall mailing of the Foundation.

7. The defendant Carnell signed and sent a letter to H. M. Dean, Financial Director of the Foundation, requesting advance payment of $300,000 to New Century.

8. On or about October 20, 1958, defendants Carnell for New Century and Kline for the Foundation executed a mail campaign solicitation contract.

9. On or about March 2, 1959, Rettig for New Century and Kline for the Foundation executed a mail campaign contract.

10. On or about August 6, 1959, Fadell deposited to the account of Fred Fadell and Associates a New Century check in the amount of $3500.

11. On or about January 2, 1958, Fadell executed a personal note in the amount of $17,000 payable to New Century.

12. On or about January 11, 1955, Kline and Fadell directed that expense accounts of the Foundation employees be approved by Fadell.

13. On or about April 15, 1959, Fadell submitted a bill to the Foundation for salaries of employees of Fred Fadell and Associates for the first half of April 1959.

15. On May 25, 1959, Zimmerman wrote a letter to the Board of the Foundation transmitting a Consolidated Financial Statement.

16. On or about July 1, 1959, Zimmerman wrote a letter to the Commonwealth of Pennsylvania containing a statement to the effect that the cost of fund campaigns did not exceed 15% of the Foundation's receipts from fund campaigns for the year 1958.

* * * * * * * *

At the outset, the four defendants who lived in the Chicago area, Abraham L. Koolish, David F. Koolish, John B. Carnell and Philip G. Rettig, moved for a transfer of the case from the District of Minnesota to the Northern District of Illinois or to some other district under Rule 21(a), Federal Rules of Criminal Procedure, 18 U.S.C.A., the basis of the motion being that the extensive newspaper, radio and television publicity concerning the affairs of the Kenny Foundation and persons connected therewith, including the defendants, had so prejudiced the residents of the District of Minnesota as to preclude a fair and impartial trial therein. Defendant Kline joined in the motion. The other two Minnesota defendants, Fadell and Zimmerman, did not join in the motion but

did not oppose it. The transfer was denied. See *United States* v. *Kline*, D.C. Minn., 1962, 205 F.Supp. 637.

The trial began March 19, 1963, concluding on May 29, 1963. Fifty-two witnesses testified in behalf of the government and thirty-three witnesses for the defendants. At the beginning of the trial the defendants challenged the panel of jurors and renewed their motion to transfer the proceedings to another district for trial. The challenge and motion were overruled.

On April 8, 1963, after approximately three weeks of trial, defendant Fred Fadell announced through his attorney that he intended to change his plea from not guilty to guilty. After the change of plea had been accepted as to Count 6, the jurors were informed of the change of plea and admonished not to consider it as evidence that a crime had been committed or that any of the other defendants were guilty. Subsequent to the convictions, the defendants made motions for a new trial which were denied by written order September 10, 1963. The trial judge's excellent and comprehensive opinion expressing his reasons therefor appears in *United States* v. *Kline*, D.C. Minn., 1963, 221 F.Supp. 776.

Appellants' first attack on the judgments of conviction is that:

> THE GOVERNMENT FAILED TO PROVE A PRIMA FACIE CASE OF MAIL FRAUD OR CONSPIRACY. THE COURT SHOULD HAVE GRANTED DEFENDANTS' MOTION FOR ACQUITTAL AT THE CLOSE OF THE GOVERNMENT'S CASE.

In considering the record on appeal in a case where the government has prevailed, it is the duty of the appellate court to take that view of the evidence which is most

favorable to supporting the jury verdict and to accept as established all reasonable inferences that tend to support the action of the jury. *Taylor* v. *Mississippi*, 1943, 319 U.S. 583, 585-6; *Smith* v. *United States*, 8 Cir., 1964, 331 F.2d 265, certiorari denied . . . U.S. . . ., 33 U.S.L. Week 3128 (U.S. Oct. 5, 1964); *Slocum* v. *United States*, 8 Cir., 1963, 325 F.2d 465; *Thogmartin* v. *United States*, 8 Cir., 1963, 313 F.2d 589; *Koop* v. *United States*, 8 Cir., 1961, 296 F.2d 53; *Valentine* v. *United States*, 8 Cir., 1961, 293 F.2d 708.

With that in mind, we have given consideration to the evidence produced by the government herein. The record before us consists of almost 9,000 pages of testimony, with many hundreds of exhibits offered by both sides. The government's case in chief—including, of course, the cross-examination of its witnesses—covers well over 5,000 pages of testimony. The case was bitterly contested and on almost all material factors there was conflicting testimony. Viewing the evidence in the light most favorable to sustaining the jury verdict and accepting the inferences reasonably to be deduced therefrom, we are satisfied that the government did prove a *prima facie* case of mail fraud and conspiracy and that there is substantial evidence to support the jury's findings thereof. A detailed discussion of the voluminous testimony and exhibits would unduly and unnecessarily extend this opinion. Among other things, however, the jury could, and undoubtedly did, find the following:

1. Unbeknownst to the directors of the Kenny Foundation, the Koolishes through Empire Industries, Inc., Empire Associates and New Century paid $359,200 to Fred Fadell and Associates during the period from February 28, 1952, through May 31, 1960. Fred Fadell, in turn,

paid Marvin Kline $113,750 from December 1952 through May 1957. The inference that the other defendants knew of the division with Kline was justified through Carnell's testimony that he learned that Fadell and Associates was retaining Kline as a "consultant" and that he had so advised Phil Koolish. The close association and cooperation between the various parties supports the conclusion of complete awareness of this pay-off.

2. The Koolishes, through their companies, gave many expensive gifts to and provided entertainment for Kline and Fadell and their families, and other Foundation personnel. These gifts totalled approximately $9,300 from New Century Corporation and were charged to the Foundation like any other cost of the mail campaigns. In effect, then, the payments were made and the gifts paid for out of contributions mailed to and belonging to the Foundation.

3. The inference that the payments and gifts were in actuality bribes by the Koolish companies, using Foundation money, finds substantial support in the record.

4. The Koolishes received their costs and profits before the Foundation received anything.

5. By agreement, the Koolishes or companies controlled by them were to be paid by the Foundation $20 per thousand as rental of lists of names and addresses. In addition thereto, the Foundation was to pay all other costs of mailing, including postage. Instead of using proved contributor lists or "selected names on a nationwide basis", as promised, the Koolishes used millions of names and addresses taken from telephone books which had but little value, for which they charged $20 per thousand and which resulted in waste in postage and other expenses for undeliverable mail in the fall "cold shot" mail campaigns.

The Koolish companies made large profits through the use of telephone book names. P. H. Koolish testified that the $20 per thousand for names was where they made their profit. The Koolishes were fully aware of the tremendous amount of undeliverable mail resulting from the use of these names. Carnell, when informed of complaints from postmasters throughout the country and of the great amount of undeliverable mail, said that nothing could be done about it and that the letters from the postmasters should be destroyed.

6. The Koolishes had possession and control of lists of prior Foundation contributors. These were to be used in the spring campaigns. The fall "cold shot" campaigns made up of names from telephone books and other unproven sources were watched carefully and if a loss was indicated, they would be "sweetened" by using names of prior Kenny contributors. As an example, the 1959 fall "cold shot" campaign contained approximately 1,500,000 names from the Kenny prior contributors lists which were supposed to be used only in the spring campaigns. By this method the Foundation was charged $20 per thousand for the use of its own names.

7. Kline and Fadell aided the Koolishes and their companies to perpetrate fraud on the Foundation by permitting the LeMarge Mailing Company, Inc., controlled by the Koolishes in Chicago, to have possession and control of the prior Foundation contributors lists. The Koolishes rented these names to other organizations at prices ranging from $12 to $50 per thousand without proper accounting to the Foundation.

8. There is evidence to justify the jury's conclusion that where the Koolishes purported to provide the Foundation with special donors lists. they actually used the

Foundation's own prior contributors lists and in this way charged the Foundation $20 per thousand for the use of millions of the Foundation's own names and addresses between the years 1952 and 1959.

9. Because of these manipulations by the Koolishes of the Foundation's contributor lists, the Foundation in effect was guaranteeing the success of the fall "cold shot" campaigns and the Koolish companies' guarantees against loss therein became merely empty gestures.

10. Fadell and Kline allowed the Koolishes to unnecessarily convert the list of Kenny's contributor names and addresses from a manual card system to an IBM system at a substantial cost to the Foundation. The manual system previously used would have been sufficient for Foundation purposes. Fadell and Kline obligated the Foundation to pay the Koolishes excessive costs for IBM list maintenance, whereas maintenance of a manual list used previously thereto could have been continued for a substantially lesser sum.

11. The Koolishes charged the Foundation $25 per thousand for key punching new contributor names on IBM cards, although it could have been done for $8.80 per thousand and, typewritten, the operation, as in previous years, would have cost less.

12. Homer A. Bonhiver, Certified Public Accountant, who was engaged by the Minnesota Attorney General to participate in an investigation of the affairs of the Sister Elizabeth Kenny Foundation, testified that from his examination it was determined that of $19,454,675 collected in the mail campaigns from 1952 through 1959 only $8,056,445 was received by the Foundation.

13. The Koolishes actively hid their excessively costly operation from the contributors, public agencies and Foundation directors through the use of Fadell, Kline and J. George Zimmerman, the accountant. The defendants set up certain accounting practices designed to conceal the Koolish share in the mail campaigns. These practices included the use of false consolidated financial statements made by Zimmerman to the directors of the Foundation, reporting only the net contributions and omitting all costs of the mail campaigns. They also deceptively charged part of the high cost of the mail campaigns to public education, information, medical education, grants, publicity, etc.

14. Although the directors of the Kenny Foundation were told by Kline that the mail contracts were awarded on a competitive bid basis, this was not true. The directors were also persuaded by Kline and Fadell that no one else could have done the job cheaper.

15. When news stories in the Wall Street Journal and inquiries from Better Business Bureaus caused the Koolishes and their Empire Industries, Inc., to become suspect and an investigation as to their mailing activities for Handicapped War Veterans was commenced, followed by grand jury indictment, the mailing business of the Foundation was, in the fall of 1955, turned over to New Century Corporation and it was incorrectly made to appear to the directors of the Foundation and to others that New Century had no connection with the Koolishes or with Empire.

16. There was substantial evidence to the effect that the general directors of the Foundation did not know that the Foundation was advancing funds to the Koolishes to pre-pay the costs of the mail campaigns and the direc-

tors generally had no knowledge that Fadell and Kline were receiving money from the Koolishes. The defendants connived to and actually did set up a "Special Events Committee" to pose as a front for the national mail campaigns. Through the use of this committee actual costs of conducting the mail operations were effectively hidden. The committee reported only the net contributions. Audit statements of the committee were withheld from the Kenny directors, regulatory agencies, Kenny donors, Better Business Bureaus and contributing agencies.

17. Directors who sought to question the Koolish operation and to find out about the mail costs were gotten rid of by Kline and replaced by others.

18. While the Koolishes and their companies were by contract supposed to return to the Foundation amounts saved over the estimated and agreed costs of mail campaigns, Fadell and Kline never required an accounting and the Koolishes in several instances returned only "token" amounts.

19. The Koolishes never returned to the Foundation such wholly unnecessary expenses as the bribe payments to Fadell and Kline and the gifts and entertainment furnished to them and to other Foundation personnel.

20. The 1959 fall mailing of 12,000,000 pieces could have been performed by a Minneapolis letter shop at a savings of $27.94 per thousand less than the $67.50 per thousand charged by New Century Corporation, or a total saving to the Foundation of approximately $335,304.

21. The actions of the defendants, the manner in which they worked together, the undercover things that were done, the bribes and surreptitious payments justified the jury's conclusion in finding an overall conspiracy.

Use of the mails in furtherance of the scheme to defraud was alleged in the indictment and proven in the government's case. Use of the mails has not been challenged in the appellants' brief. Appellants further have not challenged the government's proof of overt acts committed in furtherance of the conspiracy count, No. 16.

In connection with this point, the appellants rely strongly on *Epstein* v. *United States,* 6 Cir., 1949, 174 F. 2d 754. Reliance thereon is entirely misplaced. In *Epstein* the government introduced no proof that the transactions were not entered into in good faith and in the usual course of business. Here the government has established not only excessive costs, fraudulent use of the Kenny Foundation contributors list names and charge therefor, but the surreptitious bribes to Fadell with a part thereof going to Kline. We conclude that the principles for which *Epstein* stands are inapplicable here, that the government did prove a *prima facie* case of mail fraud and conspiracy, and that the District Court's denial of the motion for acquittal at the close of the government's case was entirely correct.

Appellants' second contention is:

> IF THERE WAS ANY PROOF OF A SCHEME OR A CONSPIRACY IT WAS OF MULTIPLE SCHEMES AND MULTIPLE CONSPIRACIES INVOLVING FEWER THAN ALL OF THE DEFENDANTS. ACCORDINGLY THERE WAS A PREJUDICIAL FATAL VARIANCE BETWEEN THE INDICTMENT AND THE PROOF.

Appellants argue that while the indictment charges all seven defendants with one grand all-inclusive scheme to defraud and alleges that the defendants participated in the one overall conspiracy, the evidence and the verdicts

returned by the jury reveal that if there was any proof of a scheme or conspiracy whatsoever, it was of separate schemes and separate conspiracies involving some but fewer than all of the defendants. It is their argument that this fatal variance was prejudicial to the defendants and they cite *Kotteakos* v. *United States,* 1946, 328 U.S. 750, 90 L.Ed. 1557, and cases following the rule of *Kotteakos,* such as: *Canella* v. *United States,* 9 Cir., 1946, 157 F.2d 470; *Brooks* v. *United States,* 5 Cir., 1947, 164 F.2d 142; *Daily* v. *United States,* 9 Cir., 1960, 282 F.2d 818; *United States* v. *Russano,* 2 Cir., 1958, 257 F.2d 712; *Rocha v. United States,* 9 Cir., 1961, 288 F.2d 545. We fail to see where *Kotteakos* can be of any help to the appellants herein. In that case a number of defendants were charged with a single general conspiracy to violate the National Housing Act by inducing lending institutions to make loans which would be offered to FHA for insurance on the basis of false and fraudulent information. The defendants so charged had no connection with each other excepting that all had utilized one Brown as a broker to handle the fraudulent applications. The trial judge there instructed the jury, *inter alia,* that only one conspiracy was charged and that the acts and declarations of one conspirator bound all. The court held that the rights of the defendants were thereby substantially prejudiced and ordered judgment reversed. That is entirely dissimilar to the facts with which we are here concerned.

The indictment here did indeed charge one overall conspiracy. It alleged:

> "That from on or about January 1, 1949, to and including the date of the filing of this indictment [January 30, 1962], * * * the defendants herein, devised and intended to devise a scheme and artifice to defraud and to obtain money and property by

> means of false and fraudulent pretenses, representations and promises from The Foundation [Kenny] and the donors and contributors and prospective contributors to The Foundation, as hereinafter more particularly set forth."

In furtherance of this grand scheme, the individual defendants or conspirators were charged with the performance of certain acts which contributed to their fraudulent objective; that is, to obtain money from the Kenny Foundation and its contributors through "false and fraudulent pretenses, representations and promises". They did this in many different ways, such as letting contracts to the Koolish companies without competitive bids and at rates providing large profits to the Koolish companies; making "token refunds" to the Foundation and not requiring audits of the Koolish companies' books; paying Fadell, who divided with Kline, some $350,000 and charging that amount as operating costs; concealing the true ownership of New Century Corporation, one of the Koolish companies; the making of gifts and providing entertainment to Kline, Fadell and other officers and directors of the Foundation and charging the costs thereof as costs of preparing mailings, and in other ways as set forth in the description of the alleged scheme. It was not necessary that each conspirator took part in each one of these acts. If there existed an overall conspiracy into which each defendant had knowingly entered, then if the acts of one conspirator contributed to the overall objective, each participant was guilty even though he personally had nothing to do with those particular acts. The overall conspiracy and use of the mails to defraud is charged to have covered the period from on or about January 1, 1949, to on or about January 30, 1962.

This court was recently confronted with a similar contention in *Hayes* v. *United States,* 8 Cir., 1964, 329 F.2d 209, certiorari denied 377 U.S. 980. Therein seven defendants, all officers or employees of a named labor organization, were charged with conspiracy to violate 29 U.S.C.A. § 501(c), which provides punishment for anyone who embezzles, steals or unlawfully abstracts or converts to his own use money, funds, securities or property of a labor organization of which he is an officer, etc. Count 1 of the indictment charged that the seven defendants conspired to unlawfully abstract money and assets from the union locals. The fraudulent transactions there were of three categories: (1) Invoice padding and kick-back arrangements; (2) fraudulent automobile repairs on non-authorized vehicles; (3) fraudulent home improvements and furnishings. Upon conviction, three of the defendants appealed, claiming *inter alia* that whereas the indictment there charged a single overall conspiracy, the proof showed only separate and distinct conspiracies. There, also, the teaching of *Kotteakos* was relied on by the appellants. In denying its application to the facts there which were comparable to those with which we are here involved, we relied substantially on *Isaacs* v. *United States,* 8 Cir., 1962, 301 F.2d 706, certiorari denied 371 U.S. 818, 83 S.Ct. 32, 9 L.Ed.2d 58, wherein this court, again dealing with a similar situation and reliance by the appellants on *Kotteakos,* said beginning at page 724:

> "A fraudulent scheme and conspiracy may be and usually is established by circumstantial evidence; by inferences from the evidence of relationship of the parties and by overt acts, conduct and other probative circumstances. *Marbs* v. *United States,* 8 Cir., 250 F.2d 514, 522, 523, cert. den. sub. nom. *Sarkis* v. *United States,* 356 U.S. 919, 78 S.Ct. 703, 2 L.Ed.2d 715; *Marx* v. *United States,* 8 Cir., 86 F.2d 245, 250;

Phelps v. *United States*, 8 Cir., 160 F.2d 858, 867, cert. den. sub nom. *Peters* v. *United States*, 334 U.S. 860, 68 S.Ct. 1525, 92 L.Ed. 1780; *Madsen* v. *United States*, 10 Cir., 165 F.2d 507, 511. 'Conspirators ordinarily do not announce that they have joined their efforts for the purpose of engaging in or furthering some unlawful scheme or plan—rather they are inclined to cover their machinations, thereby casting upon the prosecution the burden, sometimes difficult, of establishing the conspiracy, and the overt acts in consequence thereof, by circumstantial evidence—by actions of the conspirators.' *Blumenfield* v. *United States*, 8 Cir., 284 F.2d 46, 53, 54, cert. den. 365 U.S. 812, 81 S.Ct. 693, 5 L.Ed.2d 692.

"'Participation in a criminal conspiracy need not be proved by direct evidence; a common purpose and plan may be inferred from a "development and a collocation of circumstances".' *Glasser* v. *United States*, 315 U.S. 60, at p. 80, 62 S.Ct. 457, 469, 86 L. Ed. 680; where the evidence affords satisfactory proof that a conspiracy has been formed, 'but slight evidence connecting a defendant therewith may still be substantial, and if so, sufficient.' *Galatas* v. *United States*, 8 Cir., 80 F.2d 15, 24, cert. den. 297 U.S. 711, 56 S.Ct. 574, 80 L.Ed. 998; *McDonald* v. *United States*, 8 Cir., 89 F.2d 128, 138, 139, cert. den. 301 U.S. 697, 57 S.Ct. 925, 81 L.Ed. 1352; *Marx* v. *United States*, supra, 86 F.2d 245, at p. 250. As pertinently stated by this Court in *Phelps* v. *United States*, supra, 160 F.2d 858, at p. 867: 'Once there is satisfactory proof that a conspiracy has been formed, the question of a particular defendant's connection with it may be merely a matter of whether the stick fits so natural into position in the fagot as to convince that it is part of it.' Cf. *United States* v. *Cohen*, 3 Cir., 197 F. 2d 26, 29; *Nye & Nissen* v. *United States*, 9 Cir., 168 F.2d 846, 852, aff'd 336 U.S. 613, 69 S.Ct. 766, 93 L. Ed. 919; *Meyers* v. *United States*, 6 Cir., 94 F.2d 433,

cert. den. 304 U.S. 583, 58 S.Ct. 1059, 82 L.Ed. 1545.

"It is not necessary to support a finding of the existence of an overall scheme or conspiracy that each participant knew others involved therein or the precise part each was playing. *Lefco* v. *United States,* 3 Cir., 74 F.2d 66, 68, 69.

> "'* * * (I)t is most often true, especially in broad schemes calling for the aid of many persons, that after discovery of enough to show clearly the essence of the scheme and the identity of a number participating, the identity and the fact of participation of others remain undiscovered and undiscoverable. Secrecy and concealment are essential features of successful conspiracy. The more completely they are achieved, the more successful the crime. Hence the law rightly gives room for allowing the conviction of those discovered upon showing sufficiently the essential nature of the plan and their connections with it, without requiring evidence of knowledge of all its details or of the participation of others. Otherwise the difficulties, not only of discovery, but of certainty in proof and of correlating proof with pleading would become insuperable, and conspirators would go free by their very ingenuity.' *Blumenthal* v. *United States,* 332 U.S. 539, at pp. 556, 557, 68 S.Ct. 248, 256, 92 L.Ed. 154."

Judge Holtzhoff, in a case where *Kotteakos* was relied on, states the proposition clearly and succinctly in *United States* v. *Speed,* D.C. D.C., 1948, 78 F.Supp. 366 at pages 368 and 369 as follows:

> "The answer to the question whether there is a single conspiracy, therefore, depends on whether there is a single agreement. There may be an undertaking to commit one crime or several crimes. If there is but one agreement, there is but one con-

spiracy. A test whether the activities of the defendants constitute a single conspiracy is whether there is a common purpose underlying the separate acts, whether the same objective is being pursued in each instance, and whether there is concerted action to achieve this end. It follows hence that the fact that the conspirators undertook to commit several crimes does not necessitate the conclusion that there are several conspiracies. A conspiracy, such as is charged in this case, may be likened to a wheel, with the hub constituting the central figure, the spokes forming its various branches and ramifications, and all being held together by the rim, which represents the agreement."

In the instant case the court carefully instructed the jury:

"Proof of a conspiracy does not require an express or formal agreement, but it must be shown beyond a reasonable doubt that the members in some way came to a mutual understanding to try to accomplish a common and unlawful plan.

"Proof of membership in a conspiracy requires a showing that the alleged conspirator knowingly and wilfully participated in the unlawful plan with the intent to further some purpose of the conspiracy.

"To participate knowingly and wilfully means to participate voluntarily and understandingly in a common and unlawful plan, and with specific intent to violate the law.

"One who knowingly and wilfully joins an existing conspiracy is charged with the same responsibility as if he had been one of the instigators of it."

We are fully satisfied from an examination of the tremendous record here that substantial evidence supports the jury finding that there was an overall conspiracy to

defraud and to obtain money and property from the Kenny Foundation and its donors, that each of the appellants cooperated with the others and each knowingly joined in the conspiracy, and that use of the mails to defraud was established in furtherance of the overall objective. It is immaterial whether or not there were minor conspiracies or schemes inside the overall conspiracy to obtain money from the Kenny Foundation and its contributors through false and fraudulent pretenses, representations and promises and that some of the defendants participated in some of these inner or smaller schemes but not in all of them.

The appellants argue that because some of the defendants were found guilty by the jury verdicts of some counts but not of others and that other defendants were found not guilty of some counts of which other defendants were found guilty, that the jury must have concluded that there were separate schemes. That does not necessarily follow. Here the evidence established one overall scheme to defraud the Kenny Foundation and its contributors. Following the overall agreement or scheme, each defendant participated in some but not all of the acts which furthered the objective of the conspiracy ; that is, to wrongfully obtain money or property from the Kenny Foundation and its contributors. The jury could have found each conspirator guilty of each count in the mail fraud indictment. It chose not to do so and that was the jury's prerogative. Those whose activities contributed the most toward the objective of the conspiracy were, by the jury, more heavily tarred with the brush of guilt than those whose activities contributed, but to a much lesser extent. It does not follow that because Zimmerman was found guilty of mail fraud in Count 9 as well as the conspiracy Count 16, the jury, to be consistent, had to find

him guilty of all mail fraud counts. The court, in sentencing him and placing him on probation after suspending the sentence, took cognizance of the fact that his participation was not major. He was a smaller wheel or spoke within the all-encompassing rim or overall conspiracy. The verdicts of the jurors merely reflect the careful consideration they gave to the status of each defendant. It should be noted that Kline was found not guilty of Counts 5 and 11, whereas the two Koolishes were found not guilty of Counts 3, 5, 11 and 12. "Consistency in the verdicts is not necessary. Each count in an indictment is regarded as if it was a separate indictment." *Dunn* v. *United States,* 1931, 284 U.S. 390, 393; *Downing* v. *United States,* 8 Cir., 1946, 157 F.2d 738. Conviction on one mail fraud count will stand even though inconsistent with acquittal on other counts. "Whether a scheme is one conspiracy or several is primarily a jury question, since it is a question of fact as to the nature of the agreement." *United States* v. *Crosby,* 2 Cir., 1961, 294 F.2d 928, 945, certiorari denied 368 U.S. 984, rehearing denied 369 U.S. 881. We find no merit in the appellants' second contention.

Appellants' third claim of error is:

> THE COURT FAILED TO SAFEGUARD THE DEFENDANTS FROM EXCESSIVE PREJUDICIAL NEWSPAPER, RADIO AND TELEVISION PUBLICITY WHICH DEPRIVED THEM OF A FAIR TRIAL.

Under this claim of error, the appellants first contend that the trial court should have transferred the case to another district for trial. Prior to the commencement of the trial, the appellants moved under Rule 21(a), Federal Rules of Criminal Procedure, 18 U. S. C. A., for a change

of venue, supporting such motion with newspaper clippings from the papers of Minneapolis and St. Paul and transcripts of radio and television news stories from Minnesota stations reflecting the publicity which this case engendered, as well as stories of the trial and conviction of defendant Kline in the state courts of Minnesota for the crime of first degree larceny in connection with his activities as Executive Director of the Kenny Foundation. The trial judge, in *United States* v. *Kline*, D.C. Minn., 1962, 205 F.Supp. 637, held, in effect, that the motion was premature. In support thereof he cited from this court *Blumenfield* v. *United States*, 8 Cir., 1960, 284 F.2d 46, certiorari denied 365 U.S. 812, 81 S.Ct. 693, 5 L.Ed.2d 692, wherein we said at page 51:

> "It is clear that the mere presence of adverse publicity does not per se establish proof of prejudice, or necessarily establish that a defendant will be unable to obtain a fair trial within the district. 'The mere fact that a juror has read newspaper accounts relative to a criminal charge is not in itself sufficient grounds for excusing a juror.' *Finnegan* v. *United States*, 8 Cir., 204 F.2d 105, 110, certiorari denied 346 U.S. 821, 74 S.Ct. 36, 98 L.Ed. 347. The ultimate question is whether it is possible to select a fair and impartial jury, and the proper occasion for such a determination is upon the *voir dire* examination."

The court thereupon denied the motion, reserving the right to the defendants to "renew their motions at the time of trial if it appears on *voir dire* that it is not possible to secure a fair and impartial jury in this District." 205 F.Supp. at p. 640.

The *voir dire* examination of the prospective jurors was conducted by the court. Forty-eight jurors were called and examined. Of the forty-eight, only seven ex-

pressed themselves as having some shade of opinion and they were all excused without being allowed to state such opinion. Of the sixteen regular and alternate jurors seated, none had formed an opinion of the guilt or innocence of the accused. With reference to the trial jury, the instant case can be likened to that which concerned the Supreme Court in *Beck* v. *Washington*, 1962, 369 U.S. 541, 82 S.Ct. 955, 8 L.Ed.2d 98, wherein the court said at page 556 of 369 U.S.:

> "* * * Of the 52 [prospective jurors] so examined, only eight admitted bias or a preformed opinion as to petitioner's guilt and six others suggested they might be biased or might have formed an opinion—all of whom were excused. Every juror challenged for cause by petitioner's counsel was excused; in addition petitioner was given six peremptory challenges, all of which were exercised. Although most of the persons thus selected for the trial jury had been exposed to some of the publicity related above, each indicated that he was not biased, that he had formed no opinion as to petitioner's guilt which would require evidence to remove, and that he would enter the trial with an open mind disregarding anything he had read on the case.
>
> "A study of the *voir dire* indicates clearly that each juror's qualifications as to impartiality far exceeded the minimum standards this Court established in its earlier cases as well as in *Irvin* v. *Dowd*, 366 U.S. 717 (1961), on which petitioner depends. There we stated:
>
> > " 'To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.' "

It should also be observed here that this trial took place approximately three years after public knowledge of the Minnesota Attorney General's investigation and two years following defendant Kline's conviction for larceny in the state court on matters arising out of his activity as Executive Director of the Foundation. The shock of the earlier exposure and the state trial could be expected to have become somewhat dissipated in the years that followed.

Appellants would draw comfort from *Rideau* v. *State of Louisiana,* 1963, 373 U.S. 723, 83 S.Ct. 1417, 10 L.Ed. 2d 663. There is no comparability. There a motion for a change of venue from one parish to another was denied. It appeared that the parish wherein the robbery, kidnapping and murder had been committed and where the trial was held had a population of 150,000. The residents of the parish had been exposed at least three times to a televised spectacle of the defendant confessing to robbery, kidnapping and murder in an examination conducted by the sheriff and state troopers in jail without the presence of defendant's counsel. Three members of the jury, which convicted the defendant, had stated on *voir dire* that they had seen and heard the defendant's televised interview with the sheriff on at least one occasion. The court stated at page 726 of 373 U.S.:

> "• • • For we hold that it was a denial of due process of law to refuse the request for a change of venue, after the people of Calcasieu Parish had been exposed repeatedly and in depth to the spectacle of Rideau personally confessing in detail to the crimes with which he was later to be charged. For anyone who has ever watched television the conclusion cannot be avoided that this spectacle, to the tens of thousands of people who saw and heard it, in a very real

> sense *was* Rideau's trial—at which he pleaded guilty to murder. Any subsequent court proceedings in a community so pervasively exposed to such a spectacle could be but a hollow formality."

We have no such situation existing in the instant case and *Rideau* is no support for appellants' contention. Additionally, a change of venue is generally directed to the sound discretion of the trial court. *Connelly* v. *United States,* 8 Cir., 1957, 249 F.2d 576, 584-5; *Finnegan* v. *United States,* 8 Cir., 1953, 204 F.2d 105, rehearing denied May 28, 1953; *Stroud* v. *United States,* 1919, 251 U.S. 15, 40 S.Ct. 50, 64 L.Ed. 103. See *Blumenfield* v. *United States,* 8 Cir., 1960, 284 F.2d 46, certiorari denied 365 U.S. 812, 81 S.Ct. 693, 5 L.Ed.2d 692; *Kilgore* v. *United States,* 8 Cir., 1963, 323 F.2d 369, certiorari denied 376 U.S. 922, 84 S.Ct. 681, 11 L.Ed.2d 617; *Bianchi* v. *United States,* 8 Cir., 1955, 219 F.2d 182, 191, certiorari denied 349 U.S. 915, 75 S.Ct. 604, 99 L.Ed. 1249, rehearing denied 349 U.S. 969, 75 S.Ct. 879, 99 L.Ed. 1290. We find that the trial court did not abuse its discretion in denying the motion for a change of venue herein.

The next claim under this heading is that the *voir dire* examination of the jurors was grossly inadequate. We have examined the record in detail as well as having given consideration to Judge Devitt's published opinion denying motions for new trial, *United States* v. *Kline,* D.C. Minn., 1963, 221 F.Supp. 776, 782-3. Instead of abuse of discretion as charged by these appellants, we find that the *voir dire* examination of the prospective jurors was conducted in a meticulously fair and a proper manner, that the trial judge was ever mindful of the rights and privileges of the appellants and that he sought to the very greatest degree to obtain for the trial of this case only fair, unbiased and conscientious jurors. We believe he succeeded.

The third charge under the general heading that the defendants were deprived of a fair trial is that the court failed to safeguard defendants from prejudicial publicity during the course of the trial. At the outset, Judge Devitt spoke to the prospective jurors as follows:

> "I want to start out by instructing you all, those of you who have just taken this oath and those of you who have been called on the jury panel, not to read anything about this case or this matter or the people involved in it in the newspapers or to listen to any radio programs about it, or to observe any television programs about it, not to talk with anybody about it, and not to permit anybody to talk with you about it, and not to talk among yourselves about it.
>
> "Now, I think you can understand better the importance of that instruction and need for you to follow it religiously if I tell you the reason for it.
>
> "In a court of law, a person is found guilty or not guilty of a crime by a jury on the basis of the evidence that is presented in the court room, by documents that are presented and by the testimony of witnesses who take the stand.
>
> • • •
>
> "• • • the point of it is that the things you hear in this room are regulated under court supervision, the things that you may properly hear that will not be prejudicial to these defendants. Of course, newspaper accounts and radio and television accounts sometimes are not always accurate and they may contain material which is not a correct reflection of what is actually going on in the courtroom. Sometimes newspaper accounts are headed by headlines which probably are not always reflective of the true story."

The jury was not to be confined—a matter which rests squarely within the sound discretion of the trial judge.

After the twelve jurors and four alternates had been chosen and sworn, the trial judge again stated:

> "I wish to emphaize to you all a point which you have heard me talk about two or three times already today, and I can't emphasize it too much, and that is the importance of your not talking with anybody about this case at any time that you are serving as jurors—you are permitted to go home, of course, at night—or permit anybody to talk with you about the case; that you do not read any newspaper accounts about this trial or about this whole matter; listen to any radio programs about it or observe and listen to any television programs about it.
>
> "Now, I'm afraid I'm going to have to repeat that admonition time and time again, so much so that you will maybe get tired of hearing it, but the fact that I do repeat it and will repeat it probably indicates its importance to you, importance far more reaching than you can maybe understand at this time."

The record indicates that during the long trial the court admonished the jury against reading newspapers and listening to the radio and watching television broadcasts some 87 times. On the last day of the trial the court examined the jurors individually and separately as to whether or not they had complied with and had been faithful to his admonitions. Without exception each juror and alternate indicated that he had complied with the court's instructions. Thereafter Judge Devitt stated:

> "The Court: The Court would like to observe from the demeanor and answers that were given to these questions by each juror that the Court is satisfied they are honest in their answers and that they have been faithful in obeying the instructions of the Court constantly given not to permit any of these outside influences to influence them in any way.

"Are there any questions or observations?

"Mr. Jenner: Your Honor pleases, in this matter about the Indictment for the jury—"

No objection was made then to the jury and the case was subsequently submitted to them for their determination. The record indicates the most scrupulous care on the part of the trial judge and also the seeming impartiality and complete honesty on the part of the jurors and alternates. We find that the appellants were not deprived of a fair trial by the publicity and that this alleged error is completely groundless.

The fourth contention of error is:

DEFENDANTS WERE GRIEVOUSLY PREJUDICED BY FADELL'S MIDTRIAL PLEA OF GUILTY. THE COURT ERRED WHEN IT PERMITTED FADELL TO CHANGE HIS PLEA, WHEN IT DENIED DEFENDANTS' SEVERAL MOTIONS MADE AT THAT TIME, AND WHEN IT INFORMED THE JURY THAT FADELL HAD PLEADED GUILTY.

On April 8, 1963, after three weeks of trial, defendant Fadell moved the court to change his plea from not guilty to guilty. After deliberation and discussion with the attorneys on both sides, the court, on April 10, 1963, out of the presence of the jury, and after ascertaining that Fadell's desire to plead guilty was voluntary and that he was competent to make it, accepted a plea of guilty to Count 6 of the indictment. Whereupon the trial court called the jury and instructed as follows:

"Members of the jury, as you observe, Mr. Fadell isn't here today, nor is his counsel, Mr. Simpson. I advise you that this morning at 9:30 Mr. Fadell moved the Court for permission to withdraw his plea of not

guilty to the charges in the Indictment and to make a plea of guilty to one of the Counts in the Indictment, Count VI, and the Court, after being satisfied that he is competent to make such a plea and did it voluntarily, granted him permission, accepted his plea of guilty. So the case as to Mr. Fadell is no longer your concern.

"The matter will go on as to the other defendants. I emphasize to you the fact that Mr. Fadell has pled guilty is not to be accepted by you as evidence of the fact that these other defendants are guilty. It is not to be viewed by you as any kind of persuasive evidence or showing that the others are guilty. You may not reason or speculate that if Mr. Fadell pled guilty to one count, then the other defendants might well be guilty of that count or of other counts.

"The guilt or the innocence of each of these other defendants must be based solely upon the evidence which has been presented and will be presented in this courtroom, and upon nothing else."

Thereafter the court, in the presence of the jury, stated that "the motions which counsel made in chambers" the day before would be considered as having been repeated in open court and that they were denied. After some discussion with reference thereto, the court again admonished the jury as follows:

"Members of the jury, I meant to say right after I told you about this happening this morning, that I hope you will be particularly careful about these admonitions now, because I suppose there will be matter in the newspapers telling about this, and on the radio and television. While I suppose it may be a practical impossibility for you to avoid seeing a headline or maybe catching a glimpse of something on television or the radio, I hope you will be persistent in following the rule in not being attentive or listening to those things.

> "As I have said to you so many times, it's of great importance, and later on, at some future time, I will explain in greater detail why it is. I hope you will persist in your admirable obedience to these admonitions."

At the specific request of the remaining defendants, the court in its general instructions at the close of the case, repeated the admonition as to Fadell's plea. It is the contention of appellants that "while purporting to be an active defendant, he [Fadeli] was, in fact, a spy in the defendants' camp. Thus, the United States Attorney admitted that, subsequent to the indictment he and members of his staff had many conferences with Fadell and Fadell had delivered to him documents, records and other evidence." They insist that the United States Attorney had a "call" on Fadell under which he could and did select the time most propitious to his case and most prejudicial to the defendants for the announcement of Fadell's plea. The trial court handled the matter in a manner approved by this court in *Wood* v. *United States,* 8 Cir., 1960, 279 F.2d 359, where much the same thing occurred. In that case three of the defendants, after the trial had commenced, withdrew their pleas of not guilty and entered pleas of guilty, this being outside the presence of the jury. Thereafter the court advised the jurors of what had occurred and admonished them in much the same manner as Judge Devitt has done in the instant case. The late Judge John Sanborn, speaking for this court, said at page 363:

> "We think the trial court did what it should have done, when it advised the jury panel that the defendants Brown and Nair had entered pleas of guilty to Count I of the indictment, and as to the effect of the pleas upon other defendants. We also approve the statement of the court to the jury with respect to the

entry of pleas of guilty by Kawell, Neudeck and Barham to Count I during the trial. See, in this connection: *Davenport* v. *United States,* 9 Cir., 260 F.2d 591, 596; *Holmes* v. *United States,* 8 Cir., 134 F.2d 125, 129-130; *Kelling* v. *United States,* 8 Cir., 121 F. 2d 428, 429. The court did not err in denying the motion for a mistrial based on the fact that the pleas of guilty to Count I by three of the defendants were entered after the trial commenced; nor did it err in not again referring to these guilty pleas, or their effect, in its final instructions to the jury."

In *United States* v. *Crosby,* 2 Cir., 1961, 294 F.2d 928, the Court of Appeals for the Second Circuit was confronted with a similar problem. Therein that court stated at page 948:

"It was not error to refuse to grant a mistrial when McCarthy pleaded guilty. Certainly the guilty plea cannot be used as evidence against the remaining defendants, *Babb* v. *United States,* 5 Cir., 1955, 218 F.2d 538; *United States* v. *Hall,* 2 Cir., 1950, 178 F.2d 853; *United States* v. *Toner,* 3 Cir., 1949, 173 F. 2d 140; but see *Grunberg* v. *United States,* 1 Cir., 1906, 145 F. 81, 86. But the federal courts have uniformly held it is not error, if proper cautionary instructions are given, for the jury to be informed during trial that one or more defendants have pleaded guilty, or even for the jury to be present when the pleas are entered. *Wood* v. *United States,* 8 Cir., 1960, 279 F.2d 359; *Davenport* v. *United States,* 9 Cir., 1958, 260 F.2d 591; *Richards* v. *United States,* 10 Cir., 1951, 193 F.2d 554; *Schliefer* v. *United States,* 3 Cir., 1923, 288 F. 368."

United States v. *Aronson,* 2 Cir., 1963, 319 F.2d 48, involved multiple charges of mail fraud as well as conspiracy. During trial three defendants withdrew their pleas of not guilty and entered pleas of guilty. The jury

was informed and also admonished properly. Citing *United States* v. *Crosby*, supra, and other cases, the court stated at page 52:

> "* * * no error can be attributed to the trial court's informing the jury of the guilty plea. Its instructions to the jury conformed both adequately and accurately with the instructions approved by appellate courts in similar situations. The trial court adhered to proper practice in cautioning the jury by saying, 'Let me point out that the fact that the Kimballs pleaded guilty is no proof whatsoever of the guilt of the two defendants who are on trial and that must be put out of your mind in determining the guilt or innocence of these two defendants, the Aronsons.' "

As to the charge that Fadell in effect was "a spy in the defendants' camp" and that the United States Attorney had a "call" on him, the trial court, after careful inquiry, found that counsel for Fadell had advised the other attorneys representing the co-defendants months before the trial that Fadell's course of action was uncertain and that it was not unlikely that he would change his plea; that the night before the trial started all counsel were again advised of substantially the same facts, so that the possibility of Fadell's changing his plea from not guilty to guilty was something of which his co-defendants and their counsel were apprised. The trial judge's statement with reference to Fadell's change of plea as found beginning at page 787 of 221 F.Supp. indicates the care and caution he used in making inquiry and becoming informed of all matters surrounding Fadell's change of plea. We think he could have done no more to see that the appellants received a fair trial before an open-minded and conscientious jury.

Appellants attempt to make something of the fact that the United States Attorney indicated that Fadell would be called as a witness if the court accepted his guilty plea and that he was not so called. The point has no substance, particularly when the record indicates that several times following the acceptance of Fadell's plea of guilty or his indication that he intended to plead guilty, appellants' counsel repeatedly made threats to move for a mistrial in the event Fadell was called. We find no significance in the matter and no prejudice to the appellants.

Appellants' fifth claim of error is:

> THE MISCONDUCT OF THE UNITED STATES ATTORNEY THROUGHOUT THE TRIAL DEPRIVED DEFENDANTS OF A FAIR TRIAL.

Under this general heading it is first insisted by the appellants that:

> "Many times during the trial various witnesses, particularly defendants or their employees, were asked questions in which the United States Attorney insinuated in detail that certain conspiratorial meetings had been held, that prejudicial and incriminating admissions had been made by various defendants or conversations had been had by or with them or in their presence, and that incriminating acts had been committed.
>
> "In each instance the witness denied the accusation and insinuation. The United States Attorney did not thereafter offer any testimony or evidence to prove any of the alleged facts so carefully and prejudicially staged and insinuated."

A consideration of the transcript may well indicate overzealousness on the part of the United States Attorney but if it does and if it amounted to misconduct on his part, we

think that it was well taken care of by the experienced and able trial judge who, at the specific request of the defendants, instructed the jury, *inter alia*:

> "And now I have a series of instructions in which I wish to call your attention to certain comments and statements made by the prosecutor concerning which no evidence was subsequently offered, and the purpose of this instruction is to invite your attention to those events, and to caution you and instruct you that you are to disregard any inferences that might arise from Mr. Lord's reference to these matters.
>
> "You will recall, for instance, that Mr. Lord was interrogating A. L. Koolish, and he inferred that a meeting took place in Chicago in February of '52, either the fall of '52 or sometime in '52, attended by Kline, Fadell and Koolish. Allegedly discussions took place about Kline's paying his income tax on money received by him from Fadell. The inference was that this group made a trip to Palm Springs, California, and remember there was a big eight-passenger Cadillac automobile, allegedly at that time the inference was that certain conversations took place between Mr. Koolish, Mr. Kline and Mr. Fadell concerning the Fadell payments to Kline. Mr. Koolish denied any such meetings in Chicago. He denied a recollection of a trip to Palm Springs or that any such conversations inferred by Mr. Lord took place."

The court thereupon carefully pointed out the names of other witnesses who had been asked questions, who had denied making the statements contained in the questions or doing the things referred to therein, and that the government had offered no evidence thereafter to establish that the events or conversations actually did take place. The court then continued:

> "Those questions, statements, inferences with respect to these matters are not evidence, and you must disregard them in reaching your verdict.

"In the course of his examination of Mr. A. L. Koolish, Mr. Lord asked questions of the witness in which he exhibited to the witness in our presence four New Century Corporation checks, and by his questions to the witness, he inferred that the checks were payable to Mr. Fadell and covered monies paid to Mr. Fadell for ulterior purposes.

"None of these checks was received in evidence. They were not identified or offered, and no testimony with respect to them was received.[3]

"They, too, are not evidence, and neither they nor any inference suggested with respect to them is to be considered by you in reaching your verdict.

"You will recall that when Mr. Lord was examining Mr. David Koolish, he put questions to him in which he inferred that Mrs. Duerr told Mr. Koolish that one one-half million Kenny Foundation contributor list names had been used in the Fall mass mailings in '56, '57 and '58. Mr. David Koolish denied any such conversation had ever taken place. He denied that the Kenny Foundation contributor list names had been used in any of those years.

"These questions of Mr. Lord and the inferences inherent in them must be disregarded by you in reaching your verdict."

It is also charged that the United States Attorney's rebuttal argument was prejudicial. We have examined the record with reference to the claimed improprieties on the part of the United States Attorney, not only in his questions but in his requests for stipulations made in front of the jury and in his rebuttal argument and are

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[3] As an indication of the care with which the jurors followed the court's instructions, it should be noted that they found all defendants not guilty of Count 11 which apparently involved one of the checks referred to by the court.

convinced that the presiding judge had the entire matter well in hand and that whenever he found it necessary to admonish counsel or to instruct the jury, he did so and that he achieved the elimination of any possible prejudice thereby. See Judge Devitt's treatment of the questions beginning at page 790 of 221 F.Supp. Other claims of misconduct or impropriety on the part of the United States Attorney have been given consideration and found not to be substantiated by the record.

Appellants' sixth and last claim of error is:

THE COURT ERRED IN THE ADMISSION OF EVIDENCE.

The court admitted testimony of the Koolish companies' business dealings with other charitable organizations such as The National Foundation for Asthmatic Children, Disabled American Veterans, Father Flanagan's Boys Town, and Pine Ridge Country School. This was objected to as irrelevant and immaterial to the issues in this case and that it would prejudice the defendants. The testimony was admitted on the theory that similar acts of the appellants indicated their intent, knowledge and the absence of any mistake or accident in their method of operating their solicitations for charitable organizations, and the court gave full and accurate instructions to the jurors thereon. We think the admissions were entirely proper and that no error was committed. *Kansas City Star* v. *United States*, 8 Cir., 1957, 240 F.2d 643, 650, certiorari denied 354 U.S. 923, 77 S.Ct. 1381, 1 L.Ed.2d 1438; *Goodman* v. *United States*, 8 Cir., 1960, 273 F.2d 853, 857; *Moses* v. *United States*, 8 Cir., 1961, 297 F.2d 621, 624.

Under this heading it is also claimed that certain government charts and summaries were misleading, speculative and erroneously admitted into evidence over objec-

tion. The charts and summaries referred to were based upon substantial evidence introduced by the government through its own witnesses or in cross-examination of the defendants' witnesses. All were subject to cross-examination or re-examination by defendants' counsel. The jury was very carefully and fully instructed as to their use. We find no error in their receipt. The admission of charts and summaries is a matter which rests largely within the sound discretion of the trial court and its action in receiving the disputed charts and summaries may not be reversed by an appellate court unless such discretion be abused. *Franano* v. *United States,* 8 Cir., 1960, 277 F.2d 511, 515, certiorari denied 364 U.S. 828, 81 S.Ct. 68, 5 L.Ed.2d 57, rehearing denied 364 U.S. 906, 81 S.Ct. 231, 5 L.Ed.2d 199; *Blackwell* v. *United States,* 8 Cir., 1957, 244 F.2d 423, 429, certiorari denied 355 U.S. 838, 78 S.Ct. 49, 2 L.Ed.2d 51; *Kampmeyer* v. *United States,* 8 Cir., 1955, 227 F.2d 313, certiorari denied 351 U.S. 904, 76 S.Ct. 706, 100 L.Ed. 1441; *Leeby* v. *United States,* 8 Cir., 1951, 192 F.2d 331; *Gariepy* v. *United States,* 6 Cir., 1951, 189 F.2d 459, 462.

This long and hard-fought case extended over a period of more than ten weeks. It presented a number of difficult questions for counsel and for the presiding judge. We have examined each claimed error and are convinced, however, that there was no prejudice to the appellants through any of the trial rulings, that the case was tried with exemplary care by Judge Devitt, that appellants all had a fair trial, and that no grounds for reversal or retrial exist.

Affirmed.

APPENDIX B

Opinion and Order of United States District Court for the District of Minnesota rendered and entered June 4, 1962 denying petitioners' motion to transfer:

This is a mail fraud prosecution against 7 defendants—4 of whom live in the Chicago area, and 3 of whom live in the Minneapolis-St. Paul area.*

The indictment alleges a scheme to defraud and the use of the mails in furtherance of it. A conspiracy is also alleged.

The 4 Chicago defendants move for a transfer of the case to the Northern District of Illinois, or to some other District, under Rule 21(a) of the Federal Rules of Practice and Procedure, 18 U.S.C.A., claiming that because of prejudice against the defendants in the District of Minnesota they cannot obtain a fair and impartial trial here. Defendant Kline joins in the motion. The other two Minnesota defendants have not opposed, but have not joined, in the motion.

In support of its motion, the moving defendants present a large number of newspaper clippings from the Twin City newspapers, and offer transcripts of radio and television news stories from Minnesota stations, which reflect the extensive publicity all of these defendants have received

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* The Chicago defendants are Abraham Koolish, David F. Koolish, John B. Carnell and Philip G. Rettig. They operate a mail solicitation business.

Marvin Kline is the former Executive Director of the Elizabeth Kenny Foundation, a charitable corporation which aids victims of infantile paralysis.

Fred Fadell was Public Relations Director, and J. George Zimmerman was Auditor, of the Kenny Foundation.

in connection with the investigations of the matter, their indictment for the instant offense by the Federal Grand Jury, the trial and conviction of Kline in the Minnesota State Court for the crime of first degree larceny, the claimed previous violations of the law by the Chicago defendants in connection with mail solicitations for a war veterans organization, and other associated events.

The defendant Kline allegedly entered into illegal agreements with some or all of the other defendants by which large amounts of money ended up in his pocket and in those of his co-defendants to the detriment of the Kenny Foundation and its contributors. It is claimed that an exorbitant percentage of the charitable contributions collected for the Kenny Foundation by the Chicago defendants was charged as expenses for the collections.

Briefly stated, the alleged scheme to defraud was that the defendants would gain and hold control and possession of a list of Kenny Foundation contributors for the benefit of the Chicago defendants by means of bribery of Kenny Foundation personnel, and by concealing from the Kenny Foundation Directors and contributors the true cost of the mail fund-raising operations and the true identities of the operators.

There is no question in my mind that the events in connection with the Kenny Foundation in the last two years have been a fertile source of publicity for the newspapers and for the radio and television stations in the Minnesota area. But the mere fact that there has been much publicity does not mean that the defendants cannot get a fair trial here. And of course the only way to determine whether or not a fair and impartial jury can be picked in Minnesota is to start questioning prospective jurors to actually see the extent of prejudice, if any, against these defendants.

The moving defendants urge that two recent decisions of the United States Supreme Court furnish strong support for the motion to transfer this matter to Chicago, or elsewhere, for trial. The cases are, *Irvin* v. *Dowd*, 1961, 366 U.S. 717, 81 S.Ct. 1639, and *Janko* v. *United States*, 366 U.S. 716, 81 S.Ct. 1662.

In *Irvin* v. *Dowd*, certain sensational publicity permeated a small town in Indiana in which a trial for murder was held. The voir dire examination indicated that 90% of 370 prospective jurors and 2/3 of those seated in the jury had an opinion as to guilt, and the accused unsuccessfully challenged for cause several persons accepted on the jury. It appears that *Irvin* is a unique case, and the trial judge, when faced with the overwhelming evidence of prejudice upon *voir dire*, should have then transferred the case elsewhere or granted a continuance. It is not likely that, at the contemplated time of trial, in the Fall of 1962, any similar widespread prejudice will be manifest here, notwithstanding the defendant Kline is a well-known person who served as Alderman and Mayor of the City of Minneapolis, and even though his claimed criminal activities and those of his fellow defendants have been the subject of a great amount of publicity. At all events, that determination cannot be accurately made until *voir dire* examination is commenced.

The other Supreme Court case, *Janko* v. *United States*, represents a reversal of a holding of the Court of Appeals of the Eighth Circuit, 281 F.2d 156. But it is a short pro forma opinion based on a confession of error by the then Solicitor General. That case involved a trial in the Eastern District of Missouri. A reading of the decision of the Court of Appeals, which recites the action of trial judge Weber in dealing with the claimed prejudice of the

jurors, indicates to me that the trial judge did everything that was reasonable or possible under the circumstances, and that he committed no error in proceeding as he did. The Court of Appeals affirmed his actions. The Supreme Court reversed solely on the "say-so" of the Solicitor General that the trial judge committed error. In effect, this confession of error by the Solicitor General reversed the Court of Appeals. This is a rather unusual course of events. Be that as it may, the *Janko* case does not constitute authority for our granting a transfer to another District where it has not yet been determined by an examination of prospective jurors that a fair trial cannot be held in the District of Minnesota.

It is interesting to observe that the case of *Irvin* v. *Dowd, supra,* was cited by the Supreme Court of the United States on May 14, 1962 in the case of *Beck* v. *Washington,* 30 Law Week 4328. This decision affirmed the decision of the Supreme Court of Washington which affirmed the action of a Washington State trial judge in denying a motion for transfer. The defendant, former Teamster Union President Beck, was charged with embezzlement. He claimed that he could not get a fair trial in the State of Washington because of extensive adverse publicity. In that case the Supreme Court particularly examined the voir dire record and concluded that the qualifications of the jurors in that case exceeded those required by the standard enunciated in *Irvin* v. *Dowd,* as follows:

> "To hold that the mere existence of any preconceived notion as to the guilt or innocence of the accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the

> juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court."

The *Beck* case belies the claimed broad sweep of *Irvin* v. *Dowd* urged by the moving defendants.

The Court has examined many decisions under this Rule cited in 18 U.S.C.A., Rule 21(a), and in Barron & Holtzoff, Federal Practice and Procedure, Sec. 2091, including, particularly *U. S.* v. *Florio,* 13 F.R.D., 296; *U. S.* v. *Dioguardi,* 20 F.R.D. 33; *Shockley* v. *U. S.,* 166 F.2d 704; *Bianchi* v. *U. S.,* 219 F.2d 182; *U. S.* v. *Moran,* 194 F.2d 623; and *U. S.* v. *Bletterman,* 2.9 F.2d 320, and I am satisfied from a reading of these decisions that pre-trial motions for transfers to other Districts for trial under Rule 21(a) should be granted sparingly, in exceptional cases requiring such unusual action, and then only when it appears with fair certainty that it is unlikely that a fair trial can be had in the District where the indictment is returned. *U. S.* v. *Florio,* 13 F.R.D. 296, seems to be such a case.

Our Court of Appeals in the Eighth Circuit has stated the principle to be that:

> "The ultimate question is whether it is possible to select a fair and impartial jury, and the proper occasion for such a determination is upon the voir dire examination." *Blemenfeld* v. *U. S.,* 284 F.2d 46, at p. 51.

The motions for transfer to another District for trial are denied; but the defendants may renew their motions at the time of trial if it appears on voir dire that it is not possible to secure a fair and impartial jury in this District.

APPENDIX C

Opinion and Order of the United States District Court for the District of Minnesota rendered and entered September 10, 1963 denying petitioners' post trial motion:

In this mail fraud prosecution, the defendants have moved for a new trial and for judgment of acquittal following the return of jury verdicts against them. The seven named defendants were charged in a 16-Count indictment with mail fraud and conspiracy. In the course of the trial, one of the defendants, Fred Fadell, pled guilty, and the case against another defendant, Philip G. Rettig, was severed because of his incapacitating illness during the trial. The verdicts against the remaining five defendants are detailed in the footnote.[1]

Defendant Marvin L. Kline served as Alderman and Mayor of Minneapolis. He was the first President, and later Executive Director, of the Sister Elizabeth Kenny Foundation. The Foundation is a charitable organization established by the late Sister Elizabeth Kenny, noted Australian nurse. She originated a different treatment for victims of infantile paralysis. The Foundation headquartered in Minneapolis and, during the time pertinent, operated a hospital and training facilities for nurses and doctors in the Kenny method of treatment.

Defendant A. L. Koolish now lives in Los Angeles, and his son, David F. Koolish, and John B. Carnell live in the Chicago area. The three of them have long been active

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[1] The jury found all of the remaining defendants, Kline, A. L. Koolish, David Koolish, Carnell and Zimmerman guilty of conspiracy as charged in the 16th Count of the indictment. It found Kline guilty of 9 Counts of mail fraud; A. L. Koolish, 7 Counts of mail fraud; David Koolish, 7 Counts of mail fraud; Carnell, 8 Counts of mail fraud; and Zimmerman, 1 Count of mail fraud.

in the operation of mail solicitation concerns, particularly in the solicitation of funds for charitable organizations.

Philip G. Rettig, as against whom the case was severed in midtrial, served for a time as President of one of the Chicago mail solicitation companies operated by the Koolishes and Carnell.

Fred Fadell, who pled guilty in the course of the trial, served as a public relations director for the Kenny Foundation.

George Zimmerman was the Foundation's Auditor.

The Sister Elizabeth Kenny Foundation, established in 1943, grew into a substantial and nationally-known organization. Its solicitations for funds were conducted on a nationwide basis, but principal interest and financial support prevailed in the midwest area surrounding the State of Minnesota, the Detroit, Michigan area, and to some extent along the Eastern Seaboard. The Kenny method for the treatment of the victim of infantile paralysis, while first opposed by medical doctors, later was recognized as a very beneficial treatment procedure, and became generally accepted by the medical profession and by the public.

The alleged scheme to defraud set out in the indictment and sought to be proved by the government, was that the defendants would gain and hold possession of the list of the Kenny Foundation contributors for the benefit of the Chicago-based defendants, Koolish, Koolish, Carnell and Rettig, by means of bribery of Kenny Foundation Personnel, particularly Executive Director Kline and Public Relations Director Fadell, and would conceal from the Kenny Foundation Board of Directors and contributors the true cost of the mail fund operations, and the true identities of the operators.

The government sought to show at the trial, in part, that: the Chicago mail solicitation group secretly used the Kenny contributor list for their own benefit by selling the names for use in other charity fund drives; the Chicago defendants bribed Kline and Fadell with large secret payments each year; the cost to the Kenny Foundation in conducting these mail fund campaigns was exorbitant and only a small proportion of the contributions made by the public was actually returned to the Kenny Foundation; the financial operations of the Kenny Foundation were intentionally concealed, or at least not fully and accurately reflected, in the financial statements that were made available to the public, and to governmental and community organizations concerned with policing and regulating charity fund drives.

The defense presented by the defendants was, in part, that: there was no impropriety in any of their conduct; the relationship between the operators of the mail solicitation companies and the Kenny Foundation was a regular business transaction; no money was paid to Kline and Fadell as a bribe; the lists were not improperly used or sold to other charity fund solicitation organizations; the mail fund solicitors actually rendered a beneficial and substantial service to the Kenny Foundation in that of $19,000,000 received from the mail fund campaigns, $8,000,000 of it was netted to the Foundation; the Koolish fund solicitors in effect underwrote the cost of these campaigns by guaranteeing that the Kenny Foundation would incur no obligation for the conduct of campaigns which turned out to be unprofitable.

We come now to a consideration of the motions for new trial, for judgment of acquittal, and the several motions for mistrial made by the five defendants.

The motions are based on several points. The defendants Koolish, Koolish and Carnell have alleged 79 separate grounds for a new trial. Many of them are repetitious. All of the points raised in each motion have been considered. The more important ones are grouped together and afforded detailed treatments herein.

DENIAL OF THE MOTION FOR CHANGE OF VENUE

The first of these grounds deals with the claimed failure of the defendants to receive a fair trial because they were denied a change of venue.

Prior to the commencement of the trial in March of 1963, the four Chicago-based defendants moved for a transfer of the case to the Northern District of Illinois, or to some other District, under Rule 21(a), Federal Rules of Criminal Procedure, 18 U.S.C.A., claiming that because of prejudice against the defendants in the District of Minnesota caused by adverse publicity they could not obtain a fair and impartial trial here. The defendant Kline joined in that motion.

In support of the motion the defendants presented a large number of newspaper clippings from the Minneapolis and St. Paul newspapers and offered transcripts of radio and television news stories from Minnesota stations which reflected extensive publicity involving all of these defendants in connection with the investigations of the matter by the Attorney General of Minnesota, their indictment for the federal offense by the Grand Jury in Minneapolis, the trial and conviction of Kline in the Minnesota State Court for the crime of first degree larceny, and the claimed previous violations of the law by the Chicago defendants in connection with mail solicitations for a war veterans organization, and other associated events.

The defendants' arguments for change of venue were fully considered and denied. The Court's views were expressed in a memorandum reported as *United States* v. *Kline,* 205 F. Supp. 637 (D. Minn. 1962). There the Court examined the pertinent law and especially the then recent cases of *Beck* v. *Washington,* 369 U.S. 541, 82 Sup. Ct. 955, 8 L. Ed. 2d 98 (1962), and *Irvin* v. *Dowd,* 366 U.S. 717, 81 Sup. Ct. 839, 6 L. Ed. 2d 751 (1961), and, based on the most recent expression of the Court of Appeals for the Eighth Circuit in *Blumenfield* v. *United States,* 284 F. 2d 46 (8th Cir. 1960), *cert. denied,* 365 U.S. 812 (1961), held that the ultimate question involved in the motion for change of venue was whether it was possible to select a fair and impartial jury, and that the proper occasion for such a determination was upon the voir dire examination.

Now, following trial, the defendants urge that two recent decisions, one of the United States Supreme Court and one of the Second Circuit Court of Appeals, put a different light on the matter.

It is urged that *Rideau* v. *Louisiana,* 83 Sup. Ct. 1417 (1963) supports the defendants' position that a change of venue should have been granted in this case, and that it was prejudicially erroneous not to have done so.

A study of this case does not justify the suggested conclusion. The *Rideau* case involved a bank robber tried in the state court in Lake Charles, Louisiana. He was arrested the night of the commission of the crime and interviewed in his jail cell by the sheriff. The interview was recorded on film and sound track and then extensively and repeatedly broadcast so that most of the community observed or heard about the interview which, among other

things, contained Rideau's confession. Very shortly after this, he was tried in the state court and convicted. Clearly it was error for the trial judge not to grant a change of venue where so many of the prospective jurors in this small, compact, cohesive community had been repeatedly exposed "in depth," close to the time of trial, to what the court calls "the spectacle" of the defendant personally confessing in detail the crimes with which he was later charged. That was quite a different fact situation from the one here, as will later be studied.

The case of *United States ex rel. Bloeth* v. *Denno,* 313 F.2d 364 (2d Cir.), *cert. denied,* 83 Sup. Ct. 1112 (1963), *reversing* 204 F. Supp. 263 (S.D. N.Y. 1962), is also readily distinguishable. It reached the federal court in a habeas corpus proceeding. It involved a murder charge in the state court. Here, too, knowledge of the crime was widely held by the people of the community. Of 38 prospective jurors, 36 had read about the case, and 31 had formed an opinion that the defendant was guilty. The court in *Bloeth* sets out in the footnotes the results of the voir dire examination of the jurors. It is manifest that the cards were stacked against the defendant when so many of the jurors had formed an opinion that the defendant was guilty.

It should be emphasized that in this case no juror was accepted who had formed an opinion as to the guilt or innocence of these defendants. The few prospective jurors who said they had an opinion as to the guilt or innocence of the defendants were not asked to state what that opinion was, but were immediately excused by the Court.

The Second Circuit in *Bloeth* distinguished *Bloeth* from *Beck, supra,* where all who held an opinion as to the guilt

or innocence of the defendant were excused. Exactly the same was done in this case.[2]

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[2] Here is an example of the basis upon which a prospective juror was excused by the Court. Prospective juror Kenneth G. Anderson, after being asked his name, occupation, residency and other questions, was asked if he had a judgment as to the guilt or innocence of the defendants. This colloquy follows:

A. I did at one time, yes.

Q. Formulated a judgment?

A. Yes.

Q. As to whether they were guilty or innocent?

A. Yes.

Q. You say, "I did at one time."

A. Yes.

Q. Is that some time ago?

A. I haven't thought of it much since.

Q. I see.

A. It hasn't been in the papers very much in the last couple of years, last year or so.

Q. Was that maybe a couple of years ago that you formulated—

A. A year ago or so it was all in the paper.

Q. Did you follow it quite closely at that time?

A. No.

Q. Well, you did at one time. How are you today about it? Do you have a judgment about the guilt or innocence of the defendants?

A. Yes, I suppose.

Q. Do you think you could be a fair and impartial juror?

A. Yes.

Q. It sounds a little inconsistent, though, doesn't it?

A. It does.

Q. Do you think it is?

A. Gee, I wouldn't say.

Q. What?

A. I couldn't say.

Q. Well, you may be excused, Mr. Anderson. You may step down, and if you will go down to the clerk's office.

It should also be emphasized in distinguishing this case from *Rideau* and *Bloeth* that here the trial took place some three years after public knowledge of the Attorney General's investigation, and two years following Marvin Kline's conviction for larceny in the state court. So that at the time the prospective jurors were interrogated in March of 1963, the great bulk of the publicity about the "Sister Kenny matter" was more than two years old and was a past event of only slight recall to the jury panel members who had any knowledge of it.

FAIR AND IMPARTIAL JURY

Defendants' next principal ground for relief is that, because of adverse newspaper, radio and television publicity both before and during the trial, the Court erred in not permitting counsel to conduct the voir dire examination of the jurors or, in the alternative, in failing to ask all of the questions requested; in not permitting defendants additional peremptory challenges; and in not interrogating the jurors individually during the trial as to claimed adverse newspaper publicity. The gist of this argument is that defendants never did have a fair and impartial jury to start with, and that even if they did, it did not remain so because of the adverse publicity, particularly in the Minneapolis newspapers, to which the jurors might have been exposed.

It should be said in the beginning that the District Court in Minnesota has been confronted several times in recent years with the responsibility for securing a fair and impartial jury in trials involving persons and companies well known in the community. See, *e.g.*, *Isaacs* v. *United States*, 301 F.2d 706 (8th Cir.), *cert. denied*, 371 U.S. 818 (1962); *Dranow* v. *United States*, 307 F.2d 545 (8th Cir. 1962); *Blumenfield* v. *United States*, 284 F.2d 46 (8th Cir. 1960),

cert. denied, 365 U.S. 812 (1961); *United States* v. *Dranow,* 4-61-Cr-114 (1962); *United States* v. *Blumenfeld,* 4-60-Cr-111 (1961).

So that at the outset the Court was fully appreciative of the problems involved and of the great care to be exercised in choosing, and maintaining, a fair and impartial jury and of our "heavy duty to do everything in (our) power to assure a fair trial to the defendant(s)." *United States* v. *Accardo,* 298 F.2d 133, 140 (7th Cir. 1962). Although the Court denied the defendants' motions for change of venue to Chicago for the reasons previously stated, it did state its favorable disposition to try this case elsewhere within the District of Minnesota. Experience with the trial of well-publicized persons has shown that the people of St. Paul are many times relatively unacquainted with activities, even well-publicized activities, taking place in Minneapolis. The reverse is also true. Although the "Twin Cities" are physically contiguous, communication between and activities among residents of the two cities are not extensive. In one case, that of *United States* v. *Blumenfeld,* 4-60-Cr-111 (1961), the Court at the request of the defendants moved the place of trial from Minneapolis to St. Paul. On interrogating a panel of jurors there, it was found that only one member of the entire panel had ever heard of the defendant, a criminal figure well known in Minneapolis and the subject of extensive newspaper, radio and television publicity there for some 30 years.

In the light of this experience, the Court, in picking a jury panel for the trial of these defendants, directed the Clerk, in accordance with the authority granted by 28 U.S.C.A. Sec. 1863 (1950), to draw one-half of the jurors from St. Paul and the surrounding area, one-fourth from the rural area around the Twin Cities area and one-fourth

from the City of Minneapolis, with the thought that we were more likely thereby to secure jurors unacquainted with these defendants, their activities and the charges against them.[3] Of the jurors selected to serve in this case, only 3 came from the City of Minneapolis. Six lived in St. Paul, 2 in the suburbs or communities adjacent to St. Paul, and 1 in a suburb of Minneapolis.

VOIR DIRE EXAMINATION

Defendants complain that they were not permitted to conduct the voir dire examination. This does not occasion ground for complaint because it is clear from Rule 24(a), Federal Rules of Criminal Procedure, 18 U.S.C.A., that the Court has discretion to conduct the examination itself or to permit counsel to do so. It is the long-time habitual practice in this District for the Court to conduct all interrogation of the jurors in both civil and criminal cases, and to permit counsel, following the Court's interrogation, to submit additional questions.

In this case, the Court conducted all inquiry of the jurors. The defendants complain that the Court did not ask all of the questions which the defendants submitted to the Court. Counsel for the Chicago defendants, Koolish, Koolish and Carnell, submitted a list of 79 questions. It is true that the Court did not ask each of these questions of each of the prospective jurors. For instance, the Court

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[3] The Clerk's records reflect that the jurors reporting for service came from the following counties in the following numbers: Hennepin County, 20; Anoka County, 8; Ramsey County, 33; Dakota County, 4; Washington County, 6. Thus it appears that 46% came from Ramsey County (St. Paul), 11% from Anoka County, 8½% from Washington County, 8% from Dakota County, and only 20% from Hennepin County (in which Minneapolis is located).

did not specifically ask each juror the number of children he or she had, their names, their ages, or where they went to school. But the gist of the questions submitted going to the vital factors necessary to make a determination as to the impartiality and qualifications of the jurors, was asked. The Court particularly inquired as to the prospective jurors' association or acquaintance with the operations of the Sister Elizabeth Kenny Foundation, whether he or she had contributed to it or had worked as a solicitor. Specific and careful inquiry was made to each juror as to whether he or she had ever read or heard anything about the Kenny Foundation difficulties, with the claims of fraud involving the defendants, and with Marvin Kline's prosecution in the state court. In the event that any affirmative response was made to these and similar questions, the Court conducted further inquiries in order to elicit all the pertinent facts. All who expressed an opinion as to guilt or innocence were excused.

It wouldn't have made much sense for the Court to have asked each of the prospective jurors each of the 79 questions submitted by the Chicago defendants. Many of them dealt with irrelevant matters. Some were not pertinent in view of answers given to previous questions, and some of them were of an argumentative nature. Of course, it is well established that the questions to be asked of jurors on their voir dire examination rests in the sound discretion of the trial Court. *Yarborough* v. *United States,* 230 F.2d 56, 63 (4th Cir.), *cert. denied,* 351 U.S. 969 (1956), *affirming* 16 F.R.D. 212 (1954). The Court has reread the entire voir dire examination of all the jurors, together with the submitted questions, objections, and arguments of counsel in connection therewith, and in so far as one can make an objective judgment of his own conduct, the Court is satisfied that the voir dire examination was fair, adequate and

sufficiently extensive so as to form a basis for determining the impartiality of the prospective juror and to give the defendants an adequate background of the juror to permit counsel to intelligently exercise their peremptory challenges. It must always be remembered that a party, even in a criminal case, is not entitled to a jury which is favorable to him, but only to one which is fair and impartial. The right to an impartial jury is one of rejection and not of selection. *United States* v. *Marchant*, 25 U.S. (12 Wheat.) 480, 481, 6 L. Ed. 700 (1827); *Philbrook* v. *United States*, 117 F.2d 632 (8th Cir.), *cert. denied*, 313 U.S. 577 (1941).

PEREMPTORY CHALLENGES

And in the same connection the defendants argue that they should have been allowed more than 14 peremptory challenges. Of course, under Rule 24(b), Federal Rules of Criminal Procedure, 18 U.S.C.A., the defendants were only entitled to 10 peremptory challenges. Here the Court granted them 4 additional challenges and told counsel that if after exercising the 14 challenges they could show any grounds for the request, the Court would grant them additional challenges or would, on its own, excuse any juror evidencing the slightest bias or lack of qualification.

After interrogating each of the prospective jurors and excusing those who showed any lack of qualification or the presence of a possible prejudice, and after the defendants had exercised their peremptory challenges, a colloquy took place at the bench, at which time counsel for the Chicago defendants asked the Court to grant them additional challenges. The following colloquy is reported at pages 158, et seq. of the Transcript:

> The Court: Well, let the record show that all counsel and all defendants are here.

Have you exercised your strikes, gentlemen?

Mr. Sprowl: We have, Your Honor, and I should say on behalf of the defendants that there are more jurors we would challenge if we had the additional challenges. You said we could mention that. There are at least two on this list that we would challenge peremptorily if we had the challenge.

The Court: Do you think that they would not be fair and impartial?

Mr. Sprowl: Well, that's our—I suppose that is always why—you don't know these things.

The Court: I suppose the reason you might challenge or exercise your peremptory would be because you think one juror may be more favorable to one side than to the other, but if you have some idea that there are some jurors on that list of 32 or on the list of 8 who could not be fair and impartial, I think you ought to state it for the record, and if it is such a case, I will strike him on my own and call another juror.

Mr. Sprowl: Well, that's our feeling that we have these two other jurors that we think should not be on the jury and we—you want me to state who they are?

The Court: That's up to you.

Mr. Sprowl: If they are going to be jurors I wouldn't like anyone to know it. Shall I tell you who they are?

The Court: That's up to you because if you have exercised your strikes, they will soon be brought in and—

Mr. Sprowl: We have exercised all Your Honor has allowed.

The Court: They will soon be brought in and sworn, and if you have objection to the jury panel I think you ought to state it in the record for your own protection.

Mr. Sprowl: Well, defendants have exhausted their peremptories and if we had additi[illegible] ones we would strike jurors No. 1, Randall, and [illegible], Christensen. And we, the feeling is that because of the publicity in the case and so on that we have to interpret what we heard the way we think we should interpret it, the candor of the witness and so on. Anyway our feeling is that those, we would strike if we had the challenge.

The Court: I gather then your point is that from the viewpoint of your own case you would prefer to have somebody else, is that the point?

Mr. Sprowl: No. I think that is not the point.

The Court: You tell me what it is then.

Mr. Sprowl: My point is that we think that they would not be fair and impartial. That's our feeling.

The Court: I think you ought to state for the record, or you may think it wise to state for the record, why and in what respect and what answers to what questions prompted you to think that, if I am to make a decision on it.

You have to point out to me where in my tentative judgment to keep these jurors is in error. It seems to me that is your duty.

Mr. Sprowl: I have to state the reason I did this?

The Court: I don't think you have to, but you may think it wise to.

Mr. Sprowl: I think I would rather not state why I think so, but I do think so, and I think other defendants' counsel had agreed. We had a caucus to use these collectively. Of course, we could be very mistaken in those we struck and be mistaken all along, but that is our feeling.

It is clear from this dialogue that defendants made no showing that any of the jurors were not qualified or were not fair and impartial. If counsel had given any indica-

tion of any grounds for the action, the Court would have stricken the jurors on its own, or would have permitted additional peremptory challenges.

Subsequent colloquy in the Transcript, starting at page 162, indicates that the attorney for one of the other defendants indicated that he felt that one of the prospective jurors on the panel was of "very low intelligence." The Court does not agree with that appraisal, but, regardless, it is not only those of high intelligence who are qualified to serve as jurors. A cross section of one's "peers" consists of people of high, low and intermediate intelligence in addition to those other human variables found in any cross section of society.

It is very uncommon in this District to conduct any hearings for cause in connection with prospective jurors, and the Court pursues a liberal policy of releasing from service any juror against whom even a plausible grounds for excusing him can be stated.

The Court in this case took the inordinate precaution of interrogating each of the prospective jurors individually out of the hearing of the other members of the jury panel so that each would be uninhibited in giving answers to questions. The Court is satisfied that each of the jurors chosen, including the 4 alternate jurors, was fully qualified and, without question, fair and impartial.

ADVERSE PUBLICITY DURING TRIAL

Also, as a part of their claim that they did not receive a fair and impartial jury, it is claimed that the Court should have interrogated the jurors individually out of the presence of each other concerning claimed inaccurate and prejudicial publicity occurring during the trial on each occasion it was requested to do so.

In connection with this argument, it should be stated that the progress of this trial was covered by representatives of several news media. Accounts of the trial appeared almost every day, principally in the Minneapolis newspapers. Most of the claimed inaccuracies in news reporting are attributed to the Minneapolis Star stories. Even before questioning the jury panel members, the Court specifically instructed them not to read any newspaper accounts about the subject matter of the trial, not to listen to radio or observe television programs about it, not to talk to anyone about it, not to permit anyone to talk to them about it, and not to talk about it among themselves. This first instruction and one given after the 12 jurors and 4 alternates were sworn, are set out in the footnote below.[4]

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[4] The Court: I want to start out by instructing you all, those of you who have just taken this oath and those of you who have been called on the jury panel, not to read anything about this case or this matter or the people involved in it in the newspapers or to listen to any radio programs about it or to observe any television programs about it, not to talk with anybody about it and not to permit anybody to talk with you about it, and not to talk among yourselves about it.

Now, I think you can understand better the importance of that instruction and need for you to follow it religiously if I tell you the reason for it.

In a court of law, a person is found guilty or not guilty of a crime by a jury on the basis of the evidence that is presented in the courtroom, by documents that are presented and by the testimony of witnesses who take the stand.

• • • [T]he point of it is that the things you hear in this room are regulated under court supervision, the things that you may properly hear that will not be prejudicial to these defendants. Of course, newspaper accounts and radio and television accounts sometimes are not always accurate and they may contain material which is not a correct reflection of what is actually

This same instruction, or one very similar to it, was repeated every day during the trial—always just prior to the evening recess, many times prior to the noon recess, and every time the Court was requested to do so by counsel. The brief of government counsel states that these admonitions were given to the jury a total of 85 times.[5]

On several occasions in the course of the trial the defendants would invite the Court's attention to newspaper publicity which they claimed was unfair and prejudicial

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[5] Compare *United States* v. *Accardo*, 298 F. 2d 133 (7th Cir. 1962), where the Court refused to give cautionary instructions during the trial although requested to do so. Concurring opinion of Judge Duffy, p. 139.

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going on in the courtroom. Sometimes newspaper accounts are headed by headlines which probably are not always reflective of the true story.

(After the 12 jurors and 4 alternates had been sworn, the Court said):

I wish to emphasize to you all a point which you have heard me talk about two or three times already today, and I can't emphasize it too much, and that is the importance of your not talking with anybody about this case at any time that you are serving as jurors—you are permitted to go home, of course, at night—or permit anybody to talk with you about the case; that you do not read any newspaper accounts about this trial or about this whole matter; listen to any radio programs about it or observe and listen to any television programs about it.

Now, I am afraid I'm going to have to repeat that admonition time and time again, so much so that you will maybe get tired of hearing it, but the fact that I do repeat it and will repeat it probably indicates its importance to you, importance far more reaching than you can maybe understand at this time.

So I enjoin you to be very particular about following that admonition.

and would request the Court to interrogate the jurors individually out of the presence of the others as to whether or not they had read or discussed such news stories. In each instance the Court interrogated the jurors as a group as to whether or not they had read or heard about such stories. In each instance the jurors responded that they had not read or heard about the news stories, and had not violated the Court's repeated admonition. The defendants now complain that the Court should have interrogated each juror individually out of the presence of the others on each of such occasions. The Court did not make individual inquiry on each such occasion, but before submitting the case to the jury the Court did examine each juror individually out of the hearing of the other jurors and asked whether he or she had complied with and had been faithful in following the instructions and had read or heard about or observed or listened to any accounts or programs about the subject of the trial. See Transcript, p. 8708, et seq. It would have been an unduly time-consuming and unnecessary procedure for the Court on each occasion requested to separately interrogate each juror about each allegedly offensive news story published. As stated, stories were published almost daily. Good sense dictated that the Court not unduly burden the jury members with repetitive separate inquiry. As it was, the Court many times felt in repeating the same admonition day after day that it was doing so ad nauseam.

The results of the separate individual interrogation conducted before submitting the case to the jury satisfied the Court that each juror had been faithful in following the admonitions of the Court. Following such interrogation, and out of the presence of the jury, the Court said:

> The Court would like to observe from the demeanor and answers that were given to these questions by each juror that the Court is satisfied they are honest in

> their answers and that they have been faithful in obeying the instructions of the Court constantly given not to permit any of these outside influences to influence them in any way.

And then, addressing itself to counsel for defendants, said:

> Are there any questions or observations?

There were none. Counsel started conversation about another subject. Counsel for the defendants tendered no suggestions as to the need for further inquiry or as to the need to substitute any of the 3 then remaining alternate jurors for any of the regular jurors.

In connection with this whole subject of claimed adverse publicity affecting the fairness of a trial, it should be recalled that factual news reporting does not of itself create a prejudicial atmosphere. *Reynolds* v. *United States,* 225 F.2d 123 (5th Cir.), *cert. denied,* 350 U.S. 914 (1955), *reh. denied,* 350 U.S. 929 (1956). It would be a practical impossibility in this modern age to conduct a trial involving persons or subjects well known in the community without the consequent publicity. And, other than locking up the jury during the whole time, the only way to conduct such a trial with reasonable certainty that the jury will be uninfluenced by publicity is by careful examination of the jurors in the first instance, and a constant repetition of the admonition to the jurors not to receive any outside information about the case, followed by inquiry to insure that the instructions are obeyed. Justice Holmes once observed that, "If the mere opportunity for prejudice or corruption is to raise a presumption that they exist, it will be hard to maintain jury trials under the conditions of the present day." *Holt* v. *United States,* 218 U.S. 245, 31 Sup. Ct. 2, 54 L. Ed. 1021 (1910), *affirming* 168 Fed. 141 (W.D. Wash. 1909).

It is the Court's considered view that this jury was a fair and impartial one and in no way tainted by the publicity which accompanied the trial. But even assuming that the jurors disobeyed the repeated instructions of the Court, and lied when they said they had obeyed them, the fact remains that it is questionable if the news stories reflected any material which was not at one time or another brought out in the trial itself. The principal claim of the Chicago defendants was that the newspaper stories reported the allegedly unsavory conduct of the defendant A. L. Koolish in conducting questionable mail solicitation operations in the past, and that he had been indicted by a Grand Jury in Chicago. Defendant A. L. Koolish took the stand and in full detail told of his past experiences in the mail solicitation business and frankly told of his indictment by the Grand Jury in Chicago and of the subsequent dismissal of that indictment. The other principal defendant, David Koolish, likewise took the stand and fully told all about his past experiences and about the operations of the various mail solicitation companies which he and his father operated. Other witnesses gave similar testimony.

So that if a comparison were made of the alleged prejudicial publicity contained in the news media, principally the Minneapolis Star, with the evidence actually brought out on the trial, it might well appear that even if the jurors had been exposed to that publicity, it would not have been prejudicial because, within the principle expressed in *Reynolds, supra*, it constituted factual reporting. But the Court is satisfied that these jurors followed the admonitions of the Court and were not exposed to the newspaper publicity or any other outside influence. It is presumed that jurors will be true to their oath and conscientiously observe the instructions of the Court. *Paoli* v. *United*

States, 352 U.S. 232, 242, 77 Sup. Ct. 294, 300, 1 L. Ed. 278 (1957); *United States* v. *Sorcey,* 151 F.2d 899, 903 (7th Cir. 1945), *cert. denied,* 327 U.S. 794 (1946).

ACCEPTANCE OF FADELL'S GUILTY PLEA

On the 17th day of trial, April 10, 1963, Defendant Fadell pled guilty to Count VI of the indictment.[6] The defendants urge that the Court's acceptance of the plea and its advising the jury of that fact was error, and that the Court should have granted the requested mistrial.[7]

Upon being advised by Mr. Simpson, counsel for Fadell, on April 8, 1963, that it was Fadell's intention to ask the Court for leave to withdraw his not guilty plea and to plead guilty, the Court, in chambers, conducted extensive discussion with all counsel as to the best procedure to follow in view of the contemplated change of plea. The colloquy between Court and counsel concerning this is contained in the Transcript, pp. 3068, et seq.

In accepting Fadell's guilty plea on April 10th, and in advising the jury of that fact, the Court was governed by the guidelines set out by the Eighth Circuit Court of Appeals in the case of *Wood* v. *United States,* 279 F.2d 359 (8th Cir. 1960). This case was an appeal from the United States District Court from the Northern District of Iowa, wherein Judge Graven was faced with a very similar problem. It was also a mail fraud prosecution, and several defendants were involved. Prior to the commence-

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[6] This Count was later dismissed as to the other defendants.

[7] The Chicago defendants also moved that the case as to the remaining defendants be "severed" from the trial of Fadell. Since there were no other defendants as against whom the trial could proceed, it appears that this motion for severance was another expression of their motion for a mistrial.

ment of the trial some of the defendants pled guilty and in the course of the trial other defendants withdrew their not guilty pleas and entered guilty pleas. Judge Craven advised the jury members of these facts, but cautioned that such pleas should not be considered as evidence of the guilt of the remaining defendants on trial. This procedure was approved by the Court of Appeals, speaking through Judge Sanborn, when it said:

> "We think the trial court did what it should have done, when it advised the jury panel that the defendants Brown and Nair had entered pleas of guilty to Count I of the indictment, and as to the effect of the pleas upon other defendants. We also approve the statement of the court to the jury with respect to the entry of pleas of guilty by Kawell, Neudeck and Barham to Count I during the trial. (Citations.) The court did not err in denying the motion for a mistrial based on the fact that the pleas of guilty to Count I by three of the defendants were entered after the trial commenced; nor did it err in not again referring to these guilty pleas, or their effect, in its final instructions to the jury.

On the basis of the *Wood* case, and aping the instruction therein given by Judge Graven, the Court, upon satisfying itself that Fadell was voluntarily and intelligently withdrawing his plea of not guilty and pleading guilty, advised the jury as follows:

> Members of the jury, as you observe, Mr. Fadell isn't here today, nor is his counsel, Mr. Simpson. I advise you that this morning at 9:30 Mr. Fadell moved the Court for permission to withdraw his plea of not guilty to the charges in the Indictment and to make a plea of guilty to one of the Counts in the Indictment, Count 6, and the Court, after being satisfied that he is competent to make such a plea and did it

voluntarily, granted him permission, accepted his plea ment and that the case as to Mr. Fadell is no longer your concern.

The matter will go on as to the other defendants. I emphasize to you the fact that Mr. Fadell has pled guilty is not to be accepted by you as evidence of the fact that these other defendants are guilty. It is not to be viewed by you as any kind of persuasive evidence or showing that the others are guilty. You may not reason or speculate that if Mr. Fadell pled guilty to one count, then the other defendants might well be guilty of that count or of other counts.

The guilt or the innocence of each of these other defendants must be based solely upon the evidence which has been presented and will be presented in this courtroom, and upon nothing else.

At the specific request of the defendants the Court advised the jury as a part of its instructions following the close of testimony, as follows:

Now, with respect to Mr. Fadell. You will recall that I advised you five or six weeks ago that Mr. Fadell had moved the Court for permission to withdraw his plea of not guilty to the charges in the Indictment and to make a plea of guilty to one of the Counts in the Indictment, Count 6, and the Court, after being satisfied that he was competent to make such a plea and that he did it voluntarily, granted permission and accepted his plea of guilty to that Count of the Indictment and that the case as to Mr. Fadell is no longer your concern.

I again emphasize to you the fact that Mr. Fadell pled guilty is not to be accepted or considered by you as evidence that any other defendant is guilty of anything charged against him in any Count of the Indictment or even that any crime was committed. It is not to be viewed by you as any showing or inference that any other defendant is guilty as to any Count of the Indictment.

> You may not reason or speculate that, well, since Mr. Fadell pled guilty to one Count, that it must follow that a crime must have been committed, or that some other one or more of the defendants might well be guilty of either the one Count to which Mr. Fadell pleaded guilty or of any other Count.
>
> The guilt or the innocence of each of the remaining defendants with respect to any one or more of the Counts of the Indictment submitted to you must be based solely upon the evidence which has been presented and upon nothing else.

In reviewing our action in accepting the plea of guilty, and advising the jury of that fact, it seems to the Court now, as it seemed then, that there was nothing else for the Court to do. Certainly, under Rule 11, Federal Rules of Criminal Procedure, 18 U.S.C.A., Fadell had the right to plead guilty. Could the Court have refused to accept his plea? I doubt it. Once the Court was satisfied that the change of plea was intelligently and voluntarily made, there was no course of action open except to receive the plea.

The only sensible thing to do then was to advise the jury of that fact. They were a group of highly intelligent persons and it would be logical, when they noted the absence of Fadell and his attorney from the courtroom, to wonder what had happened to him and why he was not in court. The jury could not reasonably be kept in the dark. Sooner or later the fact would be apparent that he had pled guilty—the United States Attorney had stated his intention to call Fadell as a witness—and in the interest of a sensible administration of justice, the Court felt that the jury should be promptly advised of the true facts. This would avoid speculation on its part and any inferences detrimental to the remaining defendants. In fact,

the course of action which the Court later pursued received the approval of Mr. Harry H. Peterson, attorney for Defendant Kline, when he suggested:

> I should think it would be better to take the bull right by the horns and say that here is what has happened, and now you do so and so, and make it heavy in favor of the other defendants.

In subsequent colloquy in chambers the following day, Mr. Peterson indicated that in conference with all attorneys he had changed his mind about the matter.

If this Court were defending one of several defendants, charged with mail fraud and conspiracy, it would be unhappy if one of the defendants pled guilty in the course of the trial, and it would "make a record" with motions for mistrial, as these defendants have done. The discomfiture which Fadell's plea of guilty caused the other defendants and their counsel is very understandable. But it does not follow that a mistrial should have been granted, or that any prejudice resulted to the other defendants. Paraphrasing the eminent Judge Augustus Hand, "a man takes some risk in choosing his associates and if he is hailed into court with them, must ordinarily rely on the fairness and ability of the jury to separate the sheep from the goats" when one of his associates pleads guilty in the course of a trial. *United States* v. *Fradkin,* 81 F.2d 56, 59 (2d Cir. 1935), *cert. denied,* 297 U.S. 720 (1936).

The basic principle of law as expressed in the *Wood* case, *supra,* which this Court followed, was based on earlier Eighth Circuit cases establishing the general principle. *Holmes* v. *United States,* 134 F.2d 125, 129-30 (8th Cir.), *cert. denied,* 319 U.S. 776 (1943); *Kelling* v. *United States,* 121 F.2d 428, 429 (8th Cir. 1941). An earlier Ninth Circuit case, *Davenport* v. *United States,* 260 F.2d 591 (9th

Cir. 1958), *cert. denied* 359 U.S. 909 (1959) expresses more exactly the principle followed by trial Judge Graven in the *Wood* case, and is cited as authority by Judge Sanborn in the Circuit Court decision in the *Wood* case at p. 363 of 279 F.2d.

The defendants in their brief make the argument that Fadell wanted to plead guilty earlier in the trial or even before trial, but that Mr. Miles Lord, the United States Attorney, would not recommend the acceptance of his plea in order that Mr. Lord could have a "spy in the enemy camp" sitting with the other co-defendants. It is urged that the prosecutor had a "call" on Fadell to bring about his guilty plea at some time most propitious to the presentation of his case, and most prejudicial to the other defendants.

This suggestion was made to the Court after Fadell's counsel advised the Court that Fadell wished to change his plea to guilty, and the Court's full inquiry into the matter is reported in the Transcript, p. 3068, et seq. Mr. Simpson, the attorney for Fadell, is an experienced lawyer who enjoys a splendid reputation for integrity and the highest professional conduct. Associated with him in the representation of Fadell was Mr. W. B. G. Watson, a long-time Minneapolis lawyer with extensive experience in the field of criminal law, who also enjoys the highest reputation. The Court placed complete confidence in the representations made to the Court by these two respected members of the Bar. Mr. Simpson fully stated the facts surrounding Fadell's change of plea, and the Court is satisfied there was no improper conduct in connection with it by any of the parties involved.

Counsel for defendants urge that they were surprised by the change of plea and had no prior knowledge of the

possibility of it. But Mr. Simpson advised the Court that many months before trial he had advised the other lawyers that Fadell's course of action was uncertain and that it was not unlikely that he would change his plea. He said that the night before trial, all counsel were again advised of substantially the same facts. Counsel admitted this. So the possibility and probability of a change of plea from not guilty to guilty was well known by counsel for all of the defendants. And it was apparent during the days of trial before the change of plea was accepted that the other defendants were treating Fadell and his lawyer accordingly. Fadell was physically segregated from the other defendants, and Fadell's attorney sat conspicuously removed from the center of activity of other defense counsel.

The Court did its best to protect the other defendants from any possible prejudice which might come to them as a result of Fadell's plea of guilty. No reference was subsequently made in the course of the trial to the fact that Fadell had pled guilty, and it was only when specifically requested to do so by counsel for the remaining defendants that the Court in its jury instructions referred to the fact that Fadell had pled guilty, and emphasized that that fact should in no way be considered by the jury in determining the guilt of the remaining defendants.

CLAIMED MISCONDUCT OF UNITED STATES ATTORNEY

Defendants' next ground in support of their motions for judgment of acquittal or a new trial is based on the claimed misconduct of the United States Attorney in the course of the trial. Defendants claim that the prosecutor made prejudicial statements of alleged facts, and conducted cross-examination which inferred the existence of alleged

incriminating circumstances, as to all of which the government offered no proof; that the prosecutor in the presence of the jury requested defense counsel to stipulate to the admission of facts and exhibits, which was prejudicial; and that the rebuttal argument of the United States Attorney was inflammatory, resulting in the return of a verdict based on passion and prejudice.

The Court has examined the several claims cited by the defendants in their motion and in their brief supporting the argument that in both direct and cross-examination the prosecution insinuated the existence of facts which were not later proved.

After some nine weeks of trial, the jury was growing tired and restless. The questions of witnesses and the evidence was becoming repetitious. The Court in chambers suggested to counsel that it might be wise from the viewpoint of both sides if they contemplated closing the testimony in the near future. All parties agreed.

This fact is recited in order to suggest that it is not unlikely that if the prosecutor were afforded the opportunity, he could have proved some or maybe many of the inferences contained in the questions asked on direct and cross-examination to which defendants' counsel make objection.

Fred Fadell did not testify. The decision of the United States Attorney not to call him—although he several times stated his intention to do so—may have been based on the many vigorous anticipatory objections by defense counsel to the calling of Fadell. But, had Fadell been called, it is not improbable that his testimony would have proved many of the inferences to which objection is made.

But, at all events, the prosecutor had the duty as legal counsel for the government, to vigorously present his case as best he could and to bring out every facet of the evi-

dence which would go to prove the guilt of the defendants. A rereading of the claimed prejudicial questions and inferences does not persuade that they were prejudicial. But, to negative any improper inferences, the Court, *at the specific request of the defendants,* gave an extensive instruction directing the jury to completely disregard all the inferences and implications recited. The instruction is set out in full in the footnote below.[8]

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[8] And now I have a series of instructions in which I wish to call your attention to certain comments and statements made by the prosecutor concerning which no evidence was subsequently offered, and the purpose of this instruction is to invite your attention to those events, and to caution you and instruct you that you are to disregard any inferences that might arise from Mr. Lord's reference to these matters.

You will recall, for instance, that Mr. Lord was interrogating A. L. Koolish, and he inferred that a meeting took place in Chicago in February of '52, either the fall of '52 or sometime in '52, attended by Kline, Fadell and Koolish. Allegedly discussions took place about Kline's paying his income tax on money received by him from Fadell. The inference was that this group made a trip to Palm Springs, California, and remember there was a big eight-passenger Cadillac automobile, allegedly at that time the inference was that certain conversations took place between Mr. Koolish, Mr. Kline and Mr. Fadell concerning the Fadell payments to Kline. Mr. Koolish denied any such meetings in Chicago. He denied a recollection of a trip to Palm Springs or that any such conversations inferred by Mr. Lord took place.

You will recall also that during his examination of Philip Koolish, he was asked questions, Mr. Philip Koolish was, inferring that a meeting had taken place in Chicago attended by Mr. A. L. Koolish, Marvin Kline, Fred Fadell and D. W. Onan at which there was a discussion respecting receipt of payments by Mr. Kline from Mr. Fadell. On that occasion it was represented by Mr. Lord that such conversation took place. The witness denied the meeting and the conversation and no evidence

REQUESTS TO STIPULATE

It is also complained that counsel for the government, in the presence of the jury, requested defense counsel to

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was offered with reference to the Chicago meetings or the Palm Springs vacation meeting. Neither the statements made nor the questions put by Mr. Lord are evidence that the Chicago meeting, the Palm Springs trip, or the alleged conversations took place or that defendant A. L. Koolish had knowledge of any arrangement between or any monies paid by Fred Fadell & Associates to Mr. Kline, and so you must entirely disregard and erase those items from your mind.

In the course of his examination of Mr. Philip Koolish, Mr. Lord asked questions he inferred or in which he made a statement that A. L. Koolish told Ferguson to destroy Postmasters' letters;

That at Boston in one year over a third of hundreds of thousands of letters had to be thrown away;

That Cleveland and Cincinnati, Ohio did not have very high returns;

That the witness or one of the Chicago mail concerns gave Mr. Fadell $2,500 to make a loan to Dr. Warden.

The witness Philip Koolish denied that any of these events or conversations took place.

No evidence was offered by the Government to prove that any of these events or conversations inferred or suggested did take place.

Those questions, statements, inferences with respect to these matters are not evidence, and you must disregard them in reaching your verdict.

In the course of his examination of Mr. A. L. Koolish, Mr. Lord asked questions of the witness in which he exhibited to the witness in our presence four New Century Corporation checks, and by his questions to the witness, he inferred that the checks were payable to Mr. Fadell and covered monies paid to Mr. Fadell for ulterior purposes.

None of these checks was received in evidence. They were not identified or offered, and no testimony with respect to them was received.

They, too, are not evidence, and neither they nor any inference suggested with respect to them is to be considered by you in reaching your verdict.

stipulate to certain facts in evidence, which constituted prejudicial misconduct.

As has been pointed out, this was a long trial. But it would have been much longer were it not for the cooperative attitude of all counsel in entering into stipulations for the admission of facts and evidence, particularly including books and records of account of the several business organizations involved. Mr. Sprowl, one of the counsel for the Chicago defendants, was very cooperative in this regard. Before trial, the Court held pretrial conferences in order to secure, if possible, agreement of counsel as to the admission of evidence and other matters; and almost every afternoon following trial, the Court held informal conferences in the courtroom and on the record with reference to the course of proceedings and the admission of evidence for the next day. This visualized the expedition of the trial. It was particularly effective during the presentation of the government's case. The United States Attorney was requested to advise defense counsel as to the exhibits contemplated to be offered the next day. This permitted defense counsel to determine in advance whether or not they wanted to make objection or to agree to the admission of exhibits. This resulted in doing away with many unnecessary delays in the trial which would have otherwise taken place. As previously stated, defense counsel were very cooperative in stipulating to the introduction of exhibits.

When the various grounds for claimed prejudicial request to stipulate are examined in the light of the practice above outlined, it will be seen that the colloquy originated by the United States Attorney with reference to stipulations were, in many instances, an outgrowth of the previous discussions about the reception of evidence. But none of

the claimed suggestions for stipulation evidenced a purpose or desire to embarrass or take advantage of defendants or defendants' counsel or to prejudice the defendants in any way.

REBUTTAL ARGUMENT OF UNITED STATES ATTORNEY

It is also urged that the rebuttal argument of the United States Attorney was inflammatory and resulted in a verdict based on passion and prejudice. Many grounds are cited in support of this claim, and the argument of the prosecutor is dissected and many parts of it are particularly commented upon. It is not urged that the principal jury argument, made by the Assistant United States Attorney, was prejudicial.

It must be realized that the United States Attorney, like the attorneys representing the defendants, is an advocate and "it is entirely proper for him as earnestly as he can to persuade the jury of the truth of his side, of which he ought to be thoroughly convinced before he begins at all." *DiCarlo* v. *United States,* 6 F.2d 364, 368 (2d. Cir.) *cert. denied,* 268 U.S. 706 (1925).

The Court in *DiCarlo, supra,* went on to say that: "To shear him of all oratorical emphasis, while leaving wide latitude to the defense, is to load the scales of justice; . . ."

And so, "some latitude must be given to lawyers' language in a hard-fought case. . . ." *United States* v. *Kravitz,* 281 F.2d 581, 586 (3rd Cir. 1960), *cert. denied,* 364 U.S. 941 (1961).

The cases uniformly hold that it is only when the claimed misconduct furnishes good reason to believe that it influenced the jury's verdict that it will be held to be prejudicial and grounds for a new trial. *Marks* v. *United*

States, 260 F.2d 377, 383 (10th Cir. 1958), *cert. denied,* 358 U.S. 929 (1959). Our own Eighth Circuit Court of Appeals, in its most recent expression in *Isaacs* v. *United States,* 301 F.2d 705, 736 (8th Cir.), *cert. denied,* 371 U.S. 818 (1962), said that:

> The dominating question always, is whether the argument complained of was so offensive as to deprive the defendant of a fair trial.

The Court listened attentively to the rebuttal argument of the United States Attorney, and has reread it. While in many respects it is not a model type of prosecutor's argument, still when it is appraised in its entirety, and in the light of the long trial and the provocation by defense counsel for some of the prosecutor's comments, the argument was not so awry as to have unfairly influenced the jury or deprived the defendants of a fair trial. The evidence of guilt was voluminous and persuasive, and the Court is of the view it was upon that, not the rebuttal jury argument, that the verdicts were based.

As was reasoned by the Court of Appeals in *Blumenfield* v. *United States,* 284 F.2d 46 (8th Cir. 1960), *cert. denied,* 365 U.S. 812 (1961), the fact that the jury was so discriminating in finding guilt on some counts as to some defendants and not as to others, is persuasive that the jury reached its verdicts of guilt based only on the evidence.

As was observed by the Ninth Circuit Court of Appeals in the recent case of *White* v. *United States,* 317 F.2d 231 (9th Cir. 1963), some of the prosecutor's "remarks had been better left 'unremarked,' " but in context we do not find them inflammatory.

Before argument to the jury, all counsel agreed (Tr. p. 8171) that objections to the remarks of counsel would not

be made in the course of those arguments. This arrangement was agreed to after the Court advised counsel (Tr. 8169) of the observations of the Court of Appeals in the case of *Isaacs* v. *United States,* 301 F.2d 706 (8th Cir.), *cert. denied,* 371 U.S. 818 (1962), that the better practice is for counsel to make their objections when the allegedly offensive argument is being made, rather than to wait for the conclusion of the argument. Mr. Lord, the prosecuting attorney, agreed to this, but said that he would have no objection to being interrupted at any time by defense counsel. But, undoubtedly prompted by gentlemanly observance of the agreement, defense counsel did not do so.

But at the very first opportunity—that is, in the jury charge—the Court instructed the jury that the arguments of counsel were not to be considered as evidence. See particularly Tr. p. 8735 where the Court said, "the argument, comments, observations, expressed beliefs and opinions of these lawyers are not evidence, and they should not be considered as such by you." So that, conceding that some of the comments and observations the prosecuting attorney made in the rebuttal argument were not germane, it must be presumed that the jury followed the instructions of the Court.

It is the Court's opinion based on, participation in and observation of the trial, acquaintance with counsel and the jury, a consideration of the volume and kind of evidence received, the verdicts reached, and a knowledge of the relationship between the jury and counsel, that the prosecutor's rebuttal argument was not inflammatory or prejudicial, was not a basis for the jury's verdicts, and did not deprive the defendants of a fair trial. See *United States* v. *Brennan,* 137 F. Supp. 888 (D. Minn. 1956), *affirmed,* 240 F.2d 253 (8th Cir.), *cert. denied,* 353 U.S. 931 (1957), and cases there cited.

CLAIMED ERROR IN ADMISSION OF EVIDENCE CONCERNING OTHER CHARITY SOLICITATIONS

The Chicago defendants complain that the Court erred in admitting evidence concerning their activities with respect to other charities. It was the government's theory that the Chicago defendants, while not the apparent, were the actual, owners of several Chicago-based mail solicitation concerns, particularly Empire Associates, Lamarge Mailing Company, and New Century Corporation. Evidence was received concerning these corporations and their conduct of business with other charitable organizations such as the National Foundation for Asthmatic Children, the Disabled American Veterans, Father Flanagan's Boys' Town and Piney Woods Country School. This evidence was received on several grounds—principally to show that similar acts of the Chicago defendants evidenced their intent and knowledge, and the absence of mistake and accident, in their modus operandi in connection with the Sister Kenny Foundation. This was proper. *Moses* v. *United States,* 297 F.2d 621, 624 (8th Cir. 1961); *Goodman* v. *United States,* 273 F.2d 853, 857 (8th Cir. 1960).

The evidence was also received to show the nature and extent of the participation and control by the Koolishes in the operation of Empire, Lamarge and New Century Corporations as was alleged in the indictment, paragraphs 3 and 4.

Since it was claimed by the government that the mail fraud encompassed action of the Chicago defendants in improperly renting Kenny contributor names to the other charitable foundations, the evidence was properly admissible to prove that fact. The Court cautioned the jury as to the limited purpose for which this evidence was received in the following words:

You will recall that evidence was received concerning the operations of mail campaigns for the D.A.V., Father Flanagan's Boys' Town, for the Tucson organization and other similar organizations.

Now, while there was an interrelation between the work carried on by the Chicago mailing concerns and other charitable groups, and evidence with reference to this was pertinent in connection with the extent of list rentals and other matters, the evidence was offered, and received, primarily for the limited purpose of showing the presence or absence of the required criminal intent of the defendants to carry out the claimed fraudulent scheme or plan, and to conspire to do so, as is alleged in the indictment. So you must consider this evidence only for that limited purpose. You may not consider it as having any bearing on the disposition of the defendants to commit a crime. Tr. p. 8754.

ADMISSION OF CHARTS AND SUMMARIES

Complaint is also made to the admission of certain charts and summaries tendered by the government as being misleading and speculative. But substantial evidence was introduced and received as a basis for the reflections sought to be shown by the charts and summaries. This is proper. *United States* v. *Johnson*, 319 U.S. 503, 63 Sup. Ct. 1233, 87 L. Ed. 1546 (1943); *Epstein* v. *United States*, 246 F.2d 563 (6th Cir.), *cert. denied*, 355 U.S. 858 (1957); *Kampmeyer* v. *United States*, 227 F.2d 313 (8th Cir. 1955), *cert. denied*, 351 U.S. 904 (1956); *Somberg* v. *United States*, 71 F.2d 637 (7th Cir. 1934); *United States* v. *Park Avenue Pharmacy*, 56 F.2d 753 (2nd Cir. 1932).

The Court gave the jury an extensive cautionary instruction with reference to these charts and summaries as follows:

The testimony of an accountant and any summaries or charts prepared by him and admitted in evidence are competent for the purpose of explaining facts dis-

closed by books, records and other documents which are in evidence. However, such charts or summaries are not in and of themselves evidence and were permitted to be used here only as a matter of convenience in understanding the evidence. So, unless you find that they are in truth summaries of facts and figures shown by the evidence, you are to disregard them entirely.

You will recall that counsel had some argument among themselves as to whether certain charts which were offered correctly reflected the facts which they sought to reflect. That is particularly true, I recall, of Government's Exhibit 318, which was a computation of the the payments to Fadell and the alleged repayments of part of those monies to Kline between 1952 and 1956. I think all counsel or many of them brought that out in their arguments yesterday. Well, that chart, Exhibit 318, was a reflection, an interpretation in a way, of the facts as they were found by the Government's accountant. The defense took some exception to that. You will recall that that chart sought to show that the money was being equally divided between Fadell and Kline. The defense took the position that that wasn't true; that the accountant in setting up that chart had to do a good deal of interpreting to get it to come about even. I caution you about that.

If you find that that chart does not accurately reflect the facts, of course, discount it accordingly, or disregard it.

Another example of the same thing was Government's Exhibit 613, which embodied the estimated contributors' names used in the fall mailings between 1952 and 1959. There, too, you might view those as only estimates or maybe interpretations of the fact, but at least the position of the Government was that that chart was an accurate reflection of what the facts actually were, although the defendants took a different position.

So I caution you, when you are studying these charts and all of the charts, that you must make sure that they really reflect the facts. Tr. pp. 8762-64.

SUFFICIENCY OF EVIDENCE

The Court is satisfied that there was sufficient evidence received upon which the jury could reach the verdicts which it did. The only defendant who strongly urges otherwise is Zimmerman. While the proof as against Zimmerman was not as voluminous, as direct, or as compelling as that received as to the other defendants, there was sufficient evidence to justify the conclusion of guilt as to Counts 9 and 16 as was found by the jury, and, in fact, sufficient evidence to justify a finding of guilt as to other counts of the indictment as well. The evidence did not disclose that Zimmerman received any bribes or payments other than reasonable compensation for his professional services as a Certified Public Accountant; but there was other evidence from which the jury could well find guilt to be established. There was a substantial showing to justify the conclusion that Zimmerman falsified the audits of the Kenny Foundation, particularly as to the actual costs of the mail compaigns, and knew that the audits were intended for the public and for those charged with policing charitable drives. Zimmerman was the accountant for Kline and Fadell and knew that Kline and Fadell were receiving very substantial "payments" which came from the Chicago defendants; he did not report this or other questionable aspects of the Kenny operations of which he had knowledge, to the Board of Directors of the Kenny Foundation, albeit his professional partner, Moen, urged him to do so. After the Minnesota Attorney General started an investigation, Zimmerman changed the then current audit report to show a complete reflection of the costs of the mail operations. There was evidence that other Certified Public Accountants and accountants viewed Zimmerman's audits of the books of the Kenny Foundation as being improper.

The trial was a long one, extending from March 19, 1963 to May 29, 1963. Eighty-five witnesses testified and 803 exhibits were received. The Court Reporters said that the Record of 8,810 pages was the longest in their experience in this District.

This case was tried "to the record." Every plausible objection was made, with supporting arguments and in detail, to almost every item of evidence offered and to most courses of action attempted by the government. It is not to be inferred that counsel for any of the defendants acted improperly. Each of them was most courteous and cooperative with the Court, and conducted himself in the highest professional manner. All of the defendants were represented by competent and experienced lawyers. The attorney for Kline was a long-time Justice of the Minnesota Supreme Court and one-time Attorney General of Minnesota. Zimmerman's counsel possessed special competence in accountancy and the tax laws. The Chicago defendants were represented by a team of three well-known attorneys of long experience. The rights of each of these defendants was meticulously guarded at every stage of the proceedings. All defense counsel were conscientious and dedicated to their professional responsibilities. No lawyers could have represented the rights of these defendants more vigorously.

Although the defendants in their motion complain about improper instructions given to the jury, no instance of this is cited. The fact is that the Court gave every, or almost every, instruction which was requested by the defendants, and usually in the language suggested. Literally dozens of those requested by the United States Attorney were denied. The Court many times stated to the United States Attorney that if there was any question as to its rulings on

a close, disputed point of evidence or procedure in the trial, the ruling would be made in favor of the defendants. (See, *e.g.*, Tr. pp. 2105, 2106, 3557, 5695) It was.

Because this case was tried principally "to the record," the Court herein has discussed more extensively than usual the principal points which will undoubtedly be urged in the inevitable appeal that will follow. This has been done not alone to reflect the reasoning behind the action which the Court takes with reference to the motions made, but also to afford to the members of the Court of Appeals a greater insight and "feel" of the actual trial, the problems associated with it, and the reasoning behind the disposition which the trial Court made of the disputed points.

The Court is fully satisfied that each of these defendants received a fair trial from an impartial jury; that all evidence received was properly received; that no action of the trial Court was prejudicial to the defendants; and that the verdicts of guilt as expressed in the verdicts are amply supported by competent evidence.

All motions are denied.

Dated: September 10, 1963.

Edward J. Devitt
United States District Court

APPENDIX D

Judgment of the United States Court of Appeals for the Eighth Circuit, entered January 25, 1965:

This cause came on to be heard on the record from the United States District Court for the District of Minnesota, and was argued by counsel.

On Consideration Whereof, It is now here Ordered and Adjudged by this Court that the judgments and sentences of the said District Court, in this cause be, and the same are hereby, affirmed.

And it is further Ordered by this Court that the defendants in the said District Court, Abraham L. Koolish, David F. Koolish and John B. Carnell, do surrender themselves to the custody of the United States Marshall for the District of Minnesota if not now in custody, in execution of the judgments and sentences imposed upon them and each of them, within thirty days from and after the date of filing of the mandate of this Court in the District Court.

APPENDIX E

Order entered March 26, 1965 by the Supreme Court of the United States (per Mr. Justice Byron R. White):

Upon Consideration of the application of counsel for petitioners,

It Is Ordered that the time for filing a petition for writ of certiorari in the above-entitled case be, and the same is hereby, extended to and including April 26, 1965.

APPENDIX F

Constitutional Provisions, Statutes and Rules Involved

The Fifth Amendment to the Constitution of the United States provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger, nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment to the Constitution of the United States provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted

with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Rule 21(a) of the Federal Rules of Criminal Procedure provides:

21. Transfer from the District or Division for Trial

(a) For Prejudice in the District or Division.

The court upon motion of the defendant shall transfer the proceeding as to him to another district or division if the court is satisfied that there exists in the district or division where the prosecution is pending so great a prejudice against the defendant that he cannot obtain a fair and impartial trial in that district or division.

Rule 29(a) of the Federal Rules of Criminal Procedure provides:

29. Motion for Acquittal.

(a) Motion for Judgment of Acquittal. Motions for directed verdict are abolished and motions for judgment of acquittal shall be used in their place. The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one of more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses. If a defendant's motion for judgment of acquittal at the close of the evidence offered by the government is not granted, the defendant may offer evidence without having reserved the right.

APPENDIX G

Rebuttal argument of the United States Attorney delivered May 27, 1963 (T. 8668-8691):

Mr. Lord: Your honor, Judge Devitt, ladies and gentlemen of the jury.

I don't suppose that I have ever been or ever will be in a trial where there have been more capable adversaries in terms of counsel for the defendants.

Harry Peterson is a man of great integrity and broad experience, who was Attorney General for many years and then one of our most learned and able justices on the Supreme Court before he resigned.

Mr. Jenner, who probably has more merit badges for being a great trial lawyer than any man in America, and Mr. Sprowl, his senior partner, who has had even more experience.

Also, Mr. Mikeworth, who brings to us all of his experience as a certified public accountant and former Internal Revenue Agent man, and an attorney in his own right. These are really men with whom it is a privilege to work.

One of the real gratifications you get out of being a Government counsel and having men like this defending the folks who are charged with a crime, is that it takes some responsibility off from the Government. Otherwise you would have to try both sides of the case, in a way, but here we have been able to allow the adversary system to work. They have ably defended the rights of the men who are here charged.

Well now, I have one-half hour to try to tell you why I think that what all of these folks have said is not right. I want to tell you, we have all been in such a rush that

we haven't taken the time to tell you that I am sure each of the lawyers and everybody involved here will tell you, that you have been a wonderful and attentive jury. We want to thank you for it. You have been intelligent, you have read those exhibits. I am sure that all of these charts now are old friends of yours. You are familiar with them. When I refer to a chart, I don't have to go back and tell you a long story about it, because you know about it. We sometimes have even identified—counsel have accused us of leading questions, but I think it's made for a better understanding of the case.

A. L. Koolish never answered the question, and I asked him four times what he saw in Minneapolis, what he wanted.

Now is the time I can tell you what I think he saw here. He saw that angelic person, Sister Kenny, walking through the midst of crippled children, helping and curing as she went. He saw that picture, and he knew what an appeal that would have for the kind of business he could go into. He could take that image and put it into his mailing machine and out would come millions and millions of dollars for Koolish and some for the crippled children; Sister Kenny here, the crippled children here, and out there millions of soft-hearted Americans who would be soft to the kind of touch he was very capable of putting on them, and that's exactly what he did. There is no miracle about that.

There should be no surprise in this part of my argument to show exactly what he did. You have seen hundreds of these little pictures that I have shown to you. It says, "Thanks for your help. Thanks for your help." This was addressed to the contributor. It should really be a group picture of A. L. Koolish up here and Dave

over there, and Phil a little fainter, because he was a long ways away. Marvin Kline could be standing there with his hand on the little boy's shoulder, and Fred Fadell could be standing there taking notes for his public relations. Zimmerman could be trying to compute just how much the wheel chair cost. It's really quite a picture.

A fine businessman, Mr. Sprowl said high-class businessmen. High-class. Do you remember how they charged Kauth $50 for the names then Mr. Epstein in his report wrote back to Sister Kenny $25. Then Mrs. Duerr, the lady I should have called, you remember they said Mr. Lord should have called Mrs. Duerr, they wrote down, "Kauth thinks he is getting $5 names. They are only $2 names." That is just a small example of a high-class businessman.

When Mr. Koolish saw what was happening in Minneapolis, he wanted to get it going, wanted to get his pump working. He worked it on the D.A.V. a million and a half dollars renting D.A.V. names. He worked it on Boys' Town. He bought Miller, Miller's outfit, he controlled Miller. He was an employee. He worked it on Tucson.

Now, these things His Honor will tell you are all relevant to the intent of these defendants. Just because they may have done something wrong before is no sign you should charge them with a crime here and find them guilty. It only bears on their intent.

What did they know? Was it an accident what they did here in Minneapolis when they hired Kline and Fadell? Was it an accident? Was it a happenstance?

Did Fred Fadell fool those folks when he said he was a public relations man?

No, folks, they knew what they were doing. They got together on this. The presents that went to the National Adjutant of the D.A.V. were no more accident than the money that went back to Kline and Fred Fadell.

His Honor will instruct you that certain questions I asked were improper, and I agree that they were, because I never followed up to prove what came after those questions. If you will remember, I asked Mr. Koolish something about some certain activities that took place at a meeting in Chicago. I should never have asked him that question because I wasn't able afterwards to prove the fact of the things that I inferred; or a ride in a Cadillac where they talked about the payments to Kline, all those things should be put out of your minds. But that doesn't mean that we haven't proven all those things, same things by other means.

What His Honor will tell you is to disregard the questions that Mr. Lord asked, but in so doing, he doesn't mean that you are forbidden from finding that A. L. Koolish knew about these payments. You are allowed to accept the inferences on the evidence that is here.

Now, what did John Carnell say? I asked him:

"Did you say that Phil Koolish knew about that?" About the fact Kline was getting part of the money paid to Fadell, page 7300, and he said,

"I reported it to Mr. Phil Koolish as Mr. Kline being hired by Mr. Fadell as a consultant."

Do you remember that?

Carnell, that gentleman sitting there said that he reported it to Phil Koolish.

Now, what did Phil Koolish say about how that company was run? I asked Phil Koolish:

"So a discussion of how you handled your relationship with Sister Kenny, would you say that that was a trivial, lower echelon matter?

"A. Quite the contrary. It was one of the major matters to be discussed and decided upon.

"Q. By whom?

"A. By us as a group.

"Q. Who was that group?

"A. The group again, would be A. L. Koolish, George W. Ehrlich, Mr. Carnell, David Koolish, myself, and Miss Herter on occasion, depending on what matters were involved."

So Carnell brought the message back to Phil Koolish. Phil said that the Kenny Foundation was important. The Judge will instruct you that you don't have to disregard the inference that arises therefrom.

Ladies and gentlemen, the case is quite clear against these defendants. You can look at the computation Mr. Nordin asked you to make 108 million pieces, and figure it out, divide it by $3 per thousand. It comes out, if you take the amount that they received, subtract the 17,060 divided into the 108 million, comes out to $3.16 a thousand. That gave the boys an incentive, gave Kline and Fadell the incentive to be on the same side, to work on the Koolish team. When they did that, they were not working for the crippled children, they were working, ladies and gentlemen, for Kline, Fadell and the Koolishes.

They had pointed out a thousand contracts to you, or many of them. Those contracts, they say, who made them out? Kline and Fadell. Who were Kline and Fadell working for? The Koolishes.

I told you in my opening statement that I was going to prove that the Koolishes operated the Sister Elizabeth Kenny Foundation financially. I think we have proven that, ladies and gentlemen. I think you are satisfied with it. I think you are satisfied that the amount of the contracts was set by the Koolishes, that they decided what the charges would be, that they should decide how many were mailed out, that they decide what campaigns should be run and what tests should be run.

So now, we have talked about a lot of unimportant things. I think in that way the Government has wasted some of your time here. I apologize for that, because we didn't know many things that we only knew as they came before you here on the witness stand.

One of the very important things we knew which our case boils right down to, one exhibit, and if we had—all you have to do is know that Kline and Fadell got back part of the booty, they got back part of the loot, as Mr. Peterson described it—he had another word for it, and that overcharges were made, substantial profits.

Look at this exhibit, ladies and gentlemen. This tells the whole story in this case that we have been working on here for months and weeks and years. It's right there. In Minneapolis we could have done it for $39.55. In Chicago they did it for $67. What took them to Chicago?

What took them to Chicago is shown right in this exhibit right there. That is what took them to Chicago, and that is your motive, that is your intent, that is your reward. That is all you need to know.

You can give away Tucson, you can give away Asthmatic, you can give away D.A.V.—I had a list of them here. You can forget about the Disabled American Veterans,

Boys' Town. You can disregard the undeliverable mail. That's in the light of what we have now brought before you late in this case, when the Government finally, and I am ashamed to say it, the Government got smart enough to add up the bids and see what the real picture was.

We brought you Government Exhibit 656, so let's forget about the undeliverable mail, forget about list rental and forget about telephone directories. Put aside the whiskey and the parties. Don't consider the gifts. Forget about the football games. Do away with the fishing trips. Never mind the lawsuit or the IBM lists; Asthmatic, Boys' Town, D.A.V., the blind, the poor, the war orphans, the brain injured. Forget them.

Please forget them. Look at these two exhibits, this exhibit, $39,000 to Fadell, half to Kline, they talked about allocation, they got roughly half there, ladies and gentlemen, and what did they get it for? They got it for this, $335,000 in 1959, just about what they had to steal back from there and sweeten their list by about that same amount to make their profit. That's what they did instead of fulfilling their guarantee, they took from the contributors, from the good people who were right over here and they made up the deficit that they wouldn't make up by making a decent mailing.

You are allowed, ladies and gentlemen, His Honor has allowed these green figures in, the Government made them green so that you would know that they were estimates, but the computations are there and you are allowed to infer that every year as a result of that kind of activity, by sweetening the list there was this kind of activity that would have been losses had it not been for the use of the list, and you are also allowed, ladies and gentlemen, to use your own good sense as to whether or not if they over-

charged to that extent in 1959, they didn't do it every year, $335,000 a year, multiply that by eight or ten years, and then look at the Koolish figure, that exhibit which shows a five million dollar net worth, and add your three or four million dollars on there, and their excuse, "Well, we were good for the Foundation," they say, "We, look, we were good, look at all the money we made for the Foundation."

Is it an excuse that a bank messenger goes with that truck every day and then every once in a while or once he walks away with a suitcase full of money, is it a justification for his crime to say, "Look at all the days I delivered the money," or two bags of money and carrying them and he only takes one. Is it a justification to say, "Look, they got one bag, I only took one." That's what their excuse is.

That's the closest thing they have come to an excuse in this case is that it was a good business, and it's not a business. Do you feel like a business when you get that good feeling in your heart and send in your money to a charity, do you feel you are getting a big break if about a quarter out of a dollar gets to the crippled children? Whose business is this? What is this charity? They can talk about good business, but I don't think it rings true to you folks.

Now, there is some talk about, you are going to hear instructions from the—from His Honor, he will give certain instructions that the defendants have asked for that say, well, there is nothing illegal about hiding, about having a nominee in a corporation, there is nothing illegal about having corporate minutes made up and mailed out. There is nothing illegal about a lot of things; and that's true, and that's the law, and these folks want those in-

structions. They are entitled to them. But you are going to listen to the rest of the Judge's instructions and he will say that any conspiracy where folks have gotten together and they have an evil plan, a plan to violate the United States Laws, and in this instance the mail fraud laws, they can have an overt act, one act in furtherance of that plan, it can be a very innocent act, such as a man walking across the street, as simple as that. There is nothing illegal, assuming you don't go through a red light, about walking across the street, but they can have that kind, that can be an overt act, the mere lighting of a cigarette at the right time or place, and as here, the establishment of a corporation, the manner in which they carried it out. Those facts in themselves may not be illegal, but every one of them is designed to fool. It's designed to be a part of this scheme to hide, to hide the identity the Koolishes, and to keep them underground so their reputation wouldn't come out, so that their previous activities wouldn't be charged to Carnell and Rettig, so that the Board would be lulled into a sense of security.

Now, about the Board. Take it at its worst. Let us assume that the Board of Directors of Sister Kenny were actively and progressively in concert with these people. Let us assume, and I don't assume that for a moment, I think this was a fine, honorable board, and all good honorable business men, but take it at its worst. Take it at its worst, that the Board of Directors, those 12 or 15 people were in on the take, would that forgive Kline and Fadell? Would their actually being involved in this scheme, if they knew every element of it, including the kick-backs which nobody did, including the high charges, including the mis-mailed mail, including the parties, including the gifts, that wouldn't forgive Kline, Fadell and the Koolishes.

Take the other extreme, that the Board had nothing to do with it, but when they find out about it, they condone it, and tried to ratify it. They have no legal power to ratify a crime. They have only one duty, and Mr. Haverstock testified to that, they have the highest possible fiduciary duty, a duty to do nothing, to get in no position, to take no action or to fail to take any action which is not in absolutely the best interests of two groups of people, that millions of people who contributed to the Foundation and those little crippled children. The Board has no—it's not the Board's Foundation. That Board just acts there for the public, for folks like you and me and the rest of us here. That Board has a duty to do nothing that is inconsistent with the best interests of those children. They couldn't approve of those payments, you see, on Government's Exhibit 319, back to Kline and Fadell. They would only succeed in doing one thing, of getting themselves in trouble because it wouldn't make a bit more right.

A man cannot serve two masters. Kline tried it. Fadell tried it. A. L. Koolish didn't like it when Carnell tried to serve two masters. He said, "Oh, my, you are a full-time employee, you shouldn't be working for the Foundation." What did he think of the people he was hiring away from the Foundation? What did he think as he went about sending contracts up to Minneapolis and asking them to be signed on behalf of the Sister Kenny Foundation? And don't you think he had to grin to himself and chuckle as he knew that the men who were signing that contract were his tools, his servants? Yes, fine honorable clients, fine business men. Successful, yes, the Government stipulated they . w more about mailing than any other men in America, and particularly about this kind of mailing. They did a good job for what they wanted to do.

The low bids. Mr. Peterson has talked about the low bids throughout this case. The only significance low bids have in this case is that they represented that they were the lowest bidders. No duty on them whatsoever, on a charity to take the lowest bid, although it would be wise, but they went around and said these are the lowest bidders and kept other bidders out, only took from these folks because they said they were doing it at the lowest bid price.

Henry knew something about costs of mail. Some of the other directors did. Where did they go? What did they get for a reward of making inquiry? They got the gate, that's what they got.

It's not necessary that each of these men knew each other. It's not necessary, according to the law as His Honor will read it to you, that George Zimmerman never met A. L. Koolish. All they have to know is that there was a scheme, there was a scheme to defraud, and they have knowingly and intentionally entered it.

Now, it hurts me to think that George Zimmerman had a part in this scheme. Government's Exhibit 305 cannot be ignored. It's an integral part of it. They couldn't have done it without George Zimmerman. That's a shame that a professional man, a man who has had a good reputation in this community, should become a part of this scheme of this kind, but George Zimmerman was a part of it and he stands charged with his part in it. I submit that the Government has proven his part in it and the accounting wouldn't be so bad if anybody else had that kind of accounting, if they had brought somebody in here, or if he hadn't affirmatively represented, as just one of the last exhibits his attorney read, he piled an error on top of an error. If the original audit statements certified, or consolidated financial statement was wrong and he let it go

at that, that's a problem, but then when he misrepresents it even to the folks who are supervising it, knowing what he is using this financial statement for, how do you forgive him? How can he help but be guilty?

Ladies and gentlemen, and how do you say hindsight, hindsight, what does George Zimmerman now see that he didn't see then? What is there we should now retract from and say, "Well, George didn't know about it then"? He knew about the payments to Kline. He knew about the payments to Fadell. He knew the Board didn't know and he didn't want to tell the Board He knew about the kickbacks and he knew he was hiding the mail costs. He hadn't met A. L. Koolish, but he was a part of this scheme.

You know, they talk a lot about accounting standards, about what standards are—just give me the Indictment—what are accounting standards? We have read them here in court. One of them was written on the finger of stone—on a table of stone by the finger of God thousands of years ago, and said, "Thou Shalt Not Bear False Witness"

The accountants manual has it in there. It says whether it is a long form, whether it is a short form, whatever it is, be guided by the truth, the whole truth and nothing but the truth. And do you think we have had that?

Now, on the overt acts, remember, there is a mail fraud section here in which we charge mailing Counts. There is a conspiracy or an illegal agreement charged in the last Count of the Indictment that says that these folks got together and made an illegal agreement to violate the mail fraud statutes.

Now, that's a crime to get together and agree to violate the law, a kind of partnership in crime, which in itself is a crime, I think, because the rationale is that you can

do much more harm if you get together, so they make it a crime to get together. That is a crime separate from an individual crime that a person might commit individually.

So when we get a group together that becomes a conspiracy.

We have the overt acts listed under it. I won't read them all. It says that Koolish directed Rosner to do such and such and that Kline signed his initials on such and such. You can read this and you will recall where it comes. You are going to have to do a little work when you get back in there to deliberate.

I want to talk to you a little bit more about what you might say the over-all philosophy of this case is.

The case involves a breach of the fiduciary relation by Marvin Kline to the contributors, to the crippled children, to the public as a whole. The case involves the over-reaching by the Koolishes when they hired away these two fiduciaries, hired them away, and where they should have been working for the good of the children and the public, they began to work for the Koolishes, and the Koolishes got them hired, and then they started to really take the money.

As to the Koolishes, there was no more charity in their hearts. It wasn't charity. It was money. They may be wealthy, but they like more money.

So you folks are going to be called upon to decide the guilt or the innocence of these people. You are going to have to go back in—you don't have the benefit of the transcript. You will have to rely on your memory, and you are going to have to listen to His Honor's instructions.

If you try to listen to each one of them, there will be some things in there that make you wonder.

What you are asked to do is take this case in its over-all perspective, and you are asked to take the Judge's instructions in their over-all perspective. Then you go back to the jury room and you will have the exhibits with you, and examine all of them. You will have your old friends in the form of the charts, and you will be able to look at them, and I submit that it wouldn't be fair to these defendants nor would it be fair to the Government, although if you decide they are not guilty, come back at any time you are ready and we will be waiting, a little bit disappointed, of course, but if you decide that they are guilty, you ought to take plenty of time to deliberate.

You ought to take time to look at all the exhibits and as to each Count, be satisfied in your own heart that the mailing was done, that the scheme was there, and that the defendants were involved. That is, out of fairness to the defendants, you should take at least several hours to deliberate in this case.

Now, it's been said that Mr. Lord is trying to stampede you. You don't stampede intelligent people. The only pictures of a stampede that I have seen are of cattle. I don't think there is any stampeding involved here. I have tried not to appeal to you on that basis.

Sometimes the feelings have run high in the courtroom, and forgive us. I have what I think is important work to do and I am sure the defense counsel feel that they have important work to do. I feel, ladies and gentlemen, that you will decide that the Government has proven its case to your satisfaction.

The Court will tell you beyond a reasonable doubt, to an abiding certainty, such as you have in the most important affairs, the kind of knowledge you must have before you decide the most important affairs in your daily lives.

You have had ten weeks to look at this case, and I think that you have seen the evidence, you have heard the witnesses, you have had some doubts.

The man from Cowles Press told you everything was okay as to the Koolishes, a wonderful thing to mail. I didn't have this exhibit to ask him about at the time, but if this involves a little repudiation of the Cowles Press, I am not against it.

If you have to decide this man came here and that you didn't agree with him, why it is perfectly agreeable with the Government.

We think you, as intelligent members of this community, are here to do your duty, that you are ready to do your duty, and we have done our duty.

The Postal Inspectors that you have seen come in and out of this courtroom, the witnesses, the expenses that are inherent in this kind of thing; Mr. Nordin, who is one of the finest assistants any Attorney General or United States Attorney ever had, has worked two or three years on the case, two and a half years. All of these things have to be done.

Now it is your turn. You are the folks who have been sitting patiently here, and you have a duty to do. It may not be a pleasant duty. I don't always find my duties pleasant. I did as you did, I took an oath, and I do it.

My particular presence here as United States Attorney has nothing to do with the fact that I originally investigated the Sister Kenny case. It is just one of those accidents, happy or unhappy, as it may be. The Sister Kenny investigation was started by the Federal Government before I became United States Attorney by Mr. Janes, who is now a Judge in St. Paul. We merely carried on from there.

And so I am, I believe, able to look at this case dispassionately. I believe that the Government has carried its burden. The obligation is yours, and in the jargon of the old World War I people, to you we hand the torch, be yours to hold it high.

Many sins have been committed in the name of sweet charity. Many crimes have been committed in the name of sweet charity. Let this one not go unpunished.

Thank you, ladies and gentlemen.

APPENDIX H

Story appearing in The Minneapolis Star, Tuesday, December 25, 1962. (R. 948.)

EASIER THAN TAX CASES NOW MAIL FRAUD LAWS TRIP U. S. RACKETEERS

By LARRY FITZMAURICE

Minneapolis Star Staff Writer

This is the story of an era which began in 1930 when Scarface Al Capone became the first major underworld gangster to be convicted under the federal income tax law and which seemingly ended when Capone's Chicago successor, Tony Accardo, beat a similar rap a few months ago.

In the intervening 30 years, the T-men (Treasury Agents) have used the tax fraud law thousands of times to convict the nation's hoodlums and racketeers when other local, state and federal laws failed.

Today the emphasis—in the Twin Cities as elsewhere—by federal law enforcement officials is on use of the mail fraud statues [*sic*] for similar purposes.

It's Easier.

The reason? The mail fraud law is easier to use than the somewhat cumbersome, statistical tax fraud statute. Nearly every wrong-doer will inadvertently or necessarily use the mails in some phase of his crooked operations.

The switch is to police legitimate business with the tax law and to nail racketeers with the mail fraud statute.

Benjamin Dranow, onetime Minneapolis department store owner and financial racketeer, was convicted under both laws and is serving two 7-year sentences.

But when the nation's gangsters were running rampant over local, state and most federal laws during and following the prohibition era, there was always, since 1930 at least, the ever-present T-man armed with the tax statute to bring the hoodlums to book.

An Empire.

At the height of his criminal career Al Capone had successfully defied the city of Chicago and the state of Illinois in the creation of an empire built on bootleg whisky, vice, gambling, labor terror and other rackets.

In his heyday in the late 1920's and early 1930's, Capone was called more powerful than the mayor of Chicago. He was credited with approximately 135 gangland slayings.

He was the original "untouchable."

Despite Capone's power, financial affluence created by a $100 million a year take from the rackets, and his elaborate private espionage system, the gang leader failed to reckon with an obscure agent in the intelligence unit of the Internal Revenue Service in St. Paul.

'Get Capone'.

His name was Mike Malone, a tough, cagey, clever Irishman who drew an assignment in 1929 to "get Capone."

Using the alias Mike O'Rourke, Malone moved into Chicago. He joined a minor segment of the Capone outfit. In two years he worked his way to the top echelon of the Capone hierarchy. He gathered evidence of Capone's fabulous income as he went along.

Assisting Malone was a team of intelligence agents, including undercover men, accountants and lawyers in the federal service.

Capone went to trial before a jury charged with failure to report about $1 million dollars in income and spent most of the next 10 years in Alcatraz.

'Protection'.

As time marched on, the nation's racketeers got smart. They could buy "protection" or deceive local and state authorities regarding the illicit sources of their income. They hired the best lawyers and accountants to keep th[illegible] in the clear with the tax collector.

Internal Revenue agents worked intermittently for 25 years trying to convict Isadore (Kid Cann) Blumenfeld, head of a Minneapolis liquor syndicate.

When they brought Blumenfeld and four Kid Cann syndicate members to trial on the somewhat watered down charge of filing false statements regarding ownership of the places, the Federal Circuit Court of Appeals at St. Louis, Mo., set aside the convictions and threw the case out of court.

Miles W. Lord, United States district attorney, said the shift of emphasis from use of the tax statute to the mail fraud statute in prosecuting racketeers has been gradual, but effective.

Kline Trial.

It is the mail statute under which Marvin L. Kline, one time mayor of Minneapolis and long time executive director of Sister Elizabeth Kenny Foundation, and several others will go to trial in Minneapolis Federal Court Jan. 9.

Lord has characterized the alleged $10 million bilking of Kenny funds as among the "greatest frauds in American history."

APPENDIX I

The following is an excerpt from a speech delivered during the Fall, 1962 political campaign by Minnesota Attorney General Walter F. Mondale, who was running for re-election, and broadcast over KSTP-TV. (R. 1027):

> "My investigation of the Sister Elizabeth Kenny Foundation and other charities have disclosed that although most charities are honest and efficient, there are a few that are not, and that the public is entitled to protection so that their charitable dollar goes as far as possible and is not diverted into private pockets.
>
> We have taken steps to correct the wrongs of the Sister Kenny Foundation, and I think today it is one of the finest charities in the nation. But we all realize that more had to be done if our citizens were to be protected from a reoccurrence of this unfortunate waste and misuse of their funds. And I am proud to report that through our efforts, we were able to have adopted, at the last session, the Charities Registration Act of 1961, which now better protects the citizens of Minnesota from charity rackets than are the citizens of any other state in the union."

The following is a transcribed 58 second spot announcement that was televised 7 times and broadcast on radio 38 times by Minneapolis and St. Paul television and radio stations between October 15, 1962 and November 5, 1962, during the 1962 political campaign. (R. 1029-1032.):

WALTER F. MONDALE:

"This is your Attorney General, Walter F. Mondale.

Two years ago as your Attorney General I reported to you an example of a mis-managed charity. This report showed that money contributed by you was wasted in excessive fund raising costs, high salaries and administrative overhead.

I assisted in the prosecution of one official of that charity. [Co-defendant Marvin L. Kline] His conviction for fraud has been appealed. In addition, the auditor's license [Co-defendant J. George Zimmerman] to practice as a CPA was revoked on my petition.

As a result of these disclosures the Minnesota legislature, at my urging, passed a charities law, which requires charities to publicly disclose to you the information necessary to make an intelligent judgment as to how charitable funds are being used. Our new law, designed to protect the public, is the most effective charity law in the nation today."

ANNOUNCER:

"Protect charities and your charity. Re-elect your Attorney General, Walter F. Mondale."

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775-075—65

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 1105

ABRAHAM L. KOOLISH, DAVID F. KOOLISH, AND JOHN B. CARNELL, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is reported at 340 F. 2d 513 (Pet. App. 1–41). Opinions of the district court are reported at 205 F. Supp. 637 and 221 F. Supp. 776 (Pet. App. 42–86).

JURISDICTION

The judgment of the court of appeals was entered on January 25, 1965 (Pet. App. 87). A petition for rehearing was denied on February 25, 1965. By order of Mr. Justice White, the time for filing a petition for a writ of certiorari was extended to and including April 26, 1965. The petition for a writ of certiorari

was filed on April 26, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence supported the conviction of petitioners for mail fraud.

2. Whether the trial court erred in informing the jury of the guilty plea of a co-defendant who had been standing trial.

3. Whether the United States Attorney asked improper questions of various witnesses.

4. Whether the final argument of the United States Attorney was improper.

5. Whether petitioners were denied a fair trial by reason of pre-trial publicity.

STATEMENT

Petitioners and co-defendants Kline, Fadell, Zimmerman and Rettig were indicted in the United States District Court for the District of Minnesota for mail fraud and conspiracy, in violation of 18 U.S.C. 1341 and 371 (1 R. 1–20).[1] Fadell pleaded guilty during trial (Tr. 3223–3233), and Rettig was granted a severance due to illness (7 R. 1712). All defendants were convicted of conspiracy and of some, but not all, of the substantive charges (7 R. 1067–1070). Each of the Koolishes was sentenced to two consecutive terms of imprisonment for five years, to fines totaling $17,000 and to pay the costs of prosecution, which totaled

[1] Counts 1–15 of the indictment charged substantive offenses, count 16 charged conspiracy. The government withdrew counts 6, 7, 8 and 10 before the case was submitted to the jury (Tr. 8254).

$7,479.76.[2] Carnell was sentenced to five years' imprisonment.[3] The court of appeals affirmed.

The indictment charged that petitioners and others used the mails in furtherance of a scheme to defraud the Sister Elizabeth Kenny Foundation, as well as its contributors and prospective contributors, by diverting the funds received from large-scale direct-mail appeals to their own use, misrepresenting the true costs of such mail solicitation, bribing Foundation officers and engaging in other devious and fraudulent activities (1 R. 1–20).

The evidence showed generally that in the years 1951 through 1960 the Koolishes, through their companies, raised $21,855,285 in biannual mail campaigns for the Sister Elizabeth Kenny Foundation. Of this sum the Foundation received $8,850,559 (approximately 40 percent), and the balance was retained by the Koolishes as expenses (D.E. Z–265).[4] A portion of the retained amount was shared with Kline, executive director of the Foundation, and Fadell, its director of publicity.[5] See pp. 6–7, *infra*.

The function of the Koolish corporations was to furnish names of prospective donors and to mail out solicitations (Tr. 1026–1027). Each year a fall cam-

---

[2] They were acquitted on counts 3, 5, 11 and 12 and convicted on the remaining counts. The court imposed a five-year sentence on counts 2, 4, 9 and 16 and a second five-year sentence on counts 1, 13, 14 and 15 (7 R. 1707–1708, 1743).

[3] His acquittal was on counts 3, 5 and 11; his conviction on counts 1, 2, 4, 9, 12, 13, 14, 15 and 16 (7 R. 1709).

[4] "D.E." refers to defendants' exhibits. "G.E." refers to government exhibits. All of these have been lodged with the Court.

[5] Fadell was at first a salaried employee and later was paid through a public relations agency which had offices with the Foundation (Tr. 646, 648–649).

paign was conducted, which purportedly was restricted to persons who had not previously contributed. The following spring, a smaller campaign restricted to previous contributors was held. The Koolishes furnished the names for the fall campaign at a price of $30 per thousand. These names had been obtained principally from telephone directories and were largely valueless in terms of net return to the Foundation (Tr. 2247, 2316–2317, 6738, 6745, 5267). In the 1956 campaign about twenty million solicitations were mailed, enough to reach approximately half the homes throughout the nation (Tr. 1058). Many of the addresses were outdated, so that there were vast quantities of undeliverable mail (Tr. 2373, 2565, 2567).

The Koolish companies guaranteed the Foundation against loss on the fall campaigns (Tr. 438, 3350, 3275). In order to protect themselves, the companies, without authority, extended the campaign to former contributors and charged the Foundation for the names thus used as if they were new names (Tr. 6527–6528). Notwithstanding this practice, the margin of receipts over expenses was often slender.* Expenses were always deducted and withheld from contributions before any money was turned over to the Foundation (Tr. 1137, 1185–1188).

The mailing of solicitations was to have been done by the Koolish companies at actual cost, with the Foundation advancing the estimated cost and the

*The 1959 fall mailing to approximately twelve million prospects improperly included one and a half million names from the Kenny contributor list (Tr. 3742, 6825). Without these contributors, there would have been a deficit of $427,000 (Tr. 4374–4376, 4409–4412, 6832).

companies rebating any excess over actual expenditures (Tr. 1026–1027; G.E. 157). No audits were made of the claimed expenditures, however, and the rebates were inconsequential (Tr. 2475–2476). The service performed by the companies at a charge of $69.50 per thousand names could have been performed by a local company at a saving of $27.94 per thousand (Tr. 8199).

The Koolishes conducted their operations through various companies—Empire Associates, Empire Industries, Inc., LeMarge Mailing Service Company, Inc., and New Century Corporation (Tr. 267, 4751–4752, 6401–6402, 6480–6481). In 1955, some of the directors of the Foundation had become apprehensive about dealing with the Koolishes, who were then operating through Empire Associates (Tr. 3361–3363). As a result, Abraham Koolish, through a dummy, bought all the stock of New Century Corporation, an organization which had become inactive (Tr. 3480). Co-defendant Rettig was named president and Carnell, who had been a key employee of Empire Associates, vice president (Tr. 6489). This ownership was concealed from the Board of Directors of the Foundation (Tr. 3011, 3283, 7980). A Special Events Committee, which was controlled by the Koolishes, was created to administer the national mail campaign (Tr. 1707, 1711, 1717, 595–596, 1704, 3660). The expenditures of this committee were falsely represented as the only expenses of solicitation in jurisdictions which limited the overhead for solicitation to

15 (Tr. 4542–4544, 4986) or 16 percent of the proceeds (Tr. 4835).[1]

The Koolish companies also used lists of Kenny contributors, which totaled about three million names, in other campaigns which they conducted (Tr. 2289, 3378–3379). They sold the Kenny lists for as high as $50 per thousand (G.E. 559,633).

The profits from these operations were shared with co-defendants Kline and Fadell, of the Foundation. In January 1952, shortly after the first of the big fall campaigns for new contributors, Fadell began receiving monthly payments of $2,500 from Empire Associates (Tr. 643–645, G.E. 314–1). This was raised to $3,500 monthly in March 1953. The total amount received by Fadell from Empire between January 1952 and December 1955 was $150,000. In the same period Fadell paid Kline $74,500, purportedly for acting as consulting engineer (G.E. 318).

These payments were continued when Empire was succeeded by New Century, so that Fadell received, during the period January 1956 through May 1957, the sum of $78,700. During the same period he paid $39,250 to Kline (Tr. 4083–4089; G.E. 318, 321), indicating an approximately equal division of the sums received from the Koolish companies.

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[1] About two-thirds of the true cost was shifted into "Costs of Therapist Training Operations; Medical Education and Training Programs; Public Education & Information Services; Promotion & Development of Additional Treatment Facilities; Grants for Medical Research; Publicity & Public Relations Operations, provided through National Headquarters" (G.E. 215, 3–9).

From May 1957 through May 1960, New Century paid Fadell $130,000. There was no evidence that Fadell made direct payments to Kline during this period, but Kline's son was placed on Fadell's payroll at $9,600 annually (Tr. 4092, 7686–7687). In all, Fadell and Kline received $359,200 (Tr. 4070–4071). Petitioners knew that Fadell was turning over part of these payments to Kline (Tr. 1124–1125, 7029, 7030). All these payments were charged as expenses to the fall campaigns and were thereby taken from the contributions intended for the Kenny Foundation (Tr. 3994, 1137, 1185–1188). It was also shown that New Century made gifts to Foundation employees totaling $9,300, and these were likewise charged to the cost of the fall mailing (Tr. 3995).

ARGUMENT

1. There is no merit to petitioners' claim that the holding of the court of appeals conflicted with decisions of the District of Columbia Circuit insofar as it relied to some extent on evidence introduced as part of the defendant's case or in the prosecution's rebuttal. In this case, unlike *Cephus* v. *United States,* 324 F. 2d 893 (C.A.D.C.), and *Franklin* v. *United States,* 330 F. 2d 205 (C.A.D.C.), there was adequate evidence to support each petitioner's conviction apart from that which was introduced by the defense. The proof of the conspirators' "close association and cooperation" (Pet. App. 12)—which was part of the government's case—sufficed to establish that they knew of Fadell's payments to Kline. And, in any event, petitioners' bribery of Fadell—whether or not they knew of any

additional arrangement between him and Kline—constituted ample evidentiary basis for the judgments of conviction.

2. Nor was it error for the district court to inform the jury, with appropriate cautionary instructions, that Fadell had pleaded guilty during the trial. Fadell's change of plea occurred after three weeks of trial, and the district judge accepted his guilty plea only after making a thorough investigation of the circumstances underlying it (Tr. 3140–3157). Fadell pleaded guilty to one substantive count pursuant to the district court's observation that a plea to the conspiracy count might suggest to the jury that other defendants had conspired with him (Tr. 3200–3201). After informing the jury that Fadell had pleaded guilty to count 6, the judge emphasized to the jury that his plea should not be considered "as any kind of persuasive evidence or showing" of the guilt of any other defendant (Tr. 3240–3241). The same cautionary instruction was given in the concluding charge (Tr. 8743–8744).

The procedure followed by the court was well within its discretion. *Wood* v. *United States*, 279 F. 2d 359, 363 (C.A. 8); *Davenport* v. *United States*, 260 F. 2d 591, 596 (C.A. 9); *United States* v. *Aronson*, 319 F. 2d 48, 52 (C.A. 2), certiorari denied, 375 U.S. 920. Especially in a trial as long as this, the sudden absence of Fadell as a defendant would have caused speculation which might have been prejudicial to the remaining defendants. The court could properly conclude that the best course was to tell the jurors what had happened and to give them proper in-

structions. And petitioners offered no suggestion for any more suitable explanation than the one given by the court. Petitioners' additional implication that Fadell might have been collaborating with government during the trial is without basis in the record. The trial court, which conducted a complete investigation of the circumstances, concluded that Fadell's attorney and the government representatives were truthful in denying the charge.* *United States* v. *Kline*, 221 F. Supp. 776, 789.

3. Petitioners also charge that the United States Attorney was guilty of misconduct during his interrogation of witnesses. Although the petition for certiorari does not specify the instances of alleged misconduct, they are set out in petitioners' brief in the court of appeals at pages 81–85. None of the claims has merit since in nearly all instances there was sufficient basis in the record for the questions

* Fadell's counsel told the court that at various times since the indictment he had freely advised other defense counsel of the possibility of a change of plea, that he had offered to withdraw from meetings with other defense counsel but had been asked to remain, and that Fadell's indecision had continued after the trial commenced (Tr. 3070, 3144, 3153). During the week preceding his request to change his plea Fadell first indicated what he wanted to do, and only the day before had word been received from the Department of Justice as to the counts on which the Department of Justice would be willing to accept pleas (Tr. 3154–3157).

asked by the United States Attorney and the questions were permissible exploratory inquiries aimed at matters covered in the witnesses' direct examination.[9]

---

[9] Petitioners contend that there was no basis in the record for a question implying that in "Boston in one year over a third" of solicitation letters had to be thrown away (App. Br. 81). While the United States Attorney misspoke himself, and should have referred to Portland, Oregon, rather than Boston, the percentage of undelivered mail in Portland was shown to be 35 percent (G.E. 599). The percentage in other locations ran as high as 58 percent (Tr. 2501, 2561–2562; G.E. 596–603). There was also sufficient basis in the record for the prosecutor's interrogation of Philip Koolish with regard to a $2,500 payment to Fadell which was used to make a loan to one Dr. Warden (App. Br. 82). The books of Fadell and Associates and of Empire Associates permitted the inference that such a transaction had been consummated (G.E. 31, pp. RD 46, 44, J8).

The United States Attorney's suggestion (made during an objection to the defense's cross-examination of a government witness) that Fadell stopped payments to Kline, "only insofar as the books reflect" (at Br. 83), was based upon Government Exhibit 521, a passbook for a special account maintained by Fadell. Since this exhibit would have supported the observation only together with Fadell's explanation, and since Fadell was not called as a witness by the government in order to avoid prolonging the trial, the United States Attorney's assertion was never established in the record. However, there was adequate ground to believe that it would be proved at the time the observation was made.

The other questions challenged by petitioners in the court of appeals were either not objected to at the trial or were stricken upon timely objection being made. In one instance—the question asked by the United States Attorney of a government witness with regard to the loan made to Dr. Warden—the amount of the loan was either stated inadvertently as $25,000 or was inaccurately transcribed by the court stenographer. Finally, certain exploratory questions of defendants Zimmerman and Abraham Koolish were within the scope of those witnesses' direct examination and sought to inquire as to their knowledge of events to which other witnesses had testified.

The trial court was of the opinion that the questions complained of were not prejudicial. In any event, at the specific request of defendants, an extensive instruction was given directing the jury to disregard the questions and any inferences to be derived therefrom. *United States* v. *Kline*, 221 F. Supp. 776, 790–791. The court of appeals held that even if there was an excess of zeal on the part of the United States Attorney (which it did not find), the matter was well taken care of by the foregoing instruction. *Koolish* v. *United States*, 340 F. 2d 513, 532. There is, under the circumstances, no occasion for this Court to review this ruling.

4. There is, similarly, no substance to petitioners' assertions that the United States Attorney's summation was improper. Counsel's statement that leading questions had "made for a better understanding of the case" (Pet. App. 91) did not, as petitioners suggest, imply to the jury that untruthful representations were made during the questions or that counsel's assertions constituted evidence. The reference to what petitioner Abraham Koolish "saw" in Minneapolis was within the scope of permissible argument, and was, in any event, supported by the brochures prepared by the Koolish companies (G.E. 348–355). The references to other charities for which the Koolishes had performed their services were also supported by the record, and these charities were, in fact, referred to on many occasions by petitioners' own counsel (Tr. 8547, 8585, 8586, 8617–8621, 8623; Tr. 8547, 8585, 8617, 8622–8623; Tr. 8588, 8604, 8608, 8611; Tr. 8569, 8586).

The passing reference made during summation to the fact that the Koolishes were "wealthy" (Pet. App.

102) was responsive to their own counsel's statements regarding their wealth (Tr. 8609, 8623). Similarly, the brief mention of government "expenses" and time spent on the case (Pet. App. 104) was responsive to petitioners' references to the large staff and the long investigation which resulted in their indictment (Tr. 8629, 8635, 8475). In each of these instances, the allegedly prejudicial statement brought to the jury's attention a fact which was first emphasized by petitioners themselves.

Nor is *Windisch* v. *United States*, 295 F. 2d 531, 533–534 (C.A. 5), any support for petitioners' position. In that case, a far more questionable argument than is involved here was held not to constitute reversible error in light of the court's cautionary instructions. Here too the court instructed the jury to disregard "[t]he arguments, comments, observations, expressed beliefs and opinions" of the lawyers "unless they coincide with your own recollection of the facts and your own deductions from those facts" (Tr. 8735–8736).

The passing reference to a potential government witness who was not called (Pet. App. 92) was not objected to at trial and seems patently insignificant. And the prosecutor's statement that "I did as you did, I took an oath, and I do [my duty]" (Pet. App. 104) was merely an admonition to the jury to do its duty. See *United States* v. *Antonelli Fireworks Co.*, 155 F. 2d 631, 638 (C.A. 2), certiorari denied, 329 U.S. 742.

5. Inevitably, from the nature of the charges made, there was considerable publicity concerning this case before trial. However, the *voir dire* examination

showed how little this publicity had affected the members of the panel. One panel member said that the matter had been mentioned in the papers but he had never read about it; another said that she had read something about it, but nothing specific; a third replied that she had read about it over the years, but that "you can't always go by newspapers" (Tr. 42, 47, 50). Only seven members of the panel had ever formed an opinion about the case. Regardless of how indefinite that opinion may have been, all were excused (Tr. 55, 62, 91, 117, 141, 142, 149). The court granted fourteen peremptory challenges, stating that additional motions might be made after these were used, if counsel saw fit (Tr. 11). After the strikes had been made, there were objections to only two jurors, neither of which was based upon pre-trial publicity or knowledge about the case (Tr. 158). The challenge to the array was not renewed. The selectivity shown by the jury in its verdict is indicative of a lack of passion or prejudice on its part. *Blumenfield* v. *United States,* 284 F. 2d 46 (C.A. 8), certiorari denied, 365 U.S. 812. And the court's procedure satisfied the standards set by this Court for obtaining a fair and impartial jury. *Beck* v. *Washington,* 369 U.S. 541.

Petitioners also contend that the trial court ignored a list of 79 questions which were submitted for the court to put to the panel. At a colloquy during the examination, the court observed that the questions asked by the court covered the substance of those requested. Some of the proposed questions—such as those relating to the number of children of the members of the panel, their names, ages, where they

attended school—were properly considered irrelevant (Tr. 125–129). The petition does not specify which of the requested questions were not covered or in what other respects the *voir dire* was improperly curtailed.

CONCLUSION

The two courts below have given detailed and patient examination to each of petitioners' factual contentions, and all have been found to be without merit. It is respectfully submitted that further review by this Court of petitioners' general allegations is unwarranted, and that the petition for a writ of certiorari should be denied.

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